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Vol. VII
TRANSCRIPT OF RECORD

(Pages 2811 to 3136)

Supreme Court of the United States

OCTOBER TERM, 1947

No. 79

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, ET AL.

No. 80

LOEW'S, INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., ET AL, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 81

PARAMOUNT PICTURES, INC., AND PARAMOUNT FILM DISTRIBUTING CORPORATION, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 82

COLUMBIA PICTURES CORPORATION AND COLUMBIA PICTURES OF LOUISIANA, INC., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 83

UNITED ARTISTS CORPORATION, APPELLANT,

vs.

THE UNITED STATES OF AMERICA

[CONTINUED ON SECOND PAGE OF COVER]

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED MAY 8, 1947,

SUPREME COURT OF THE UNITED STATES

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UNITED ARTISTS CORPORATION, APPELLANT,

vs.

THE UNITED STATES OF AMERICA

No. 84

UNIVERSAL PICTURES COMPANY, INC. (SUED HEREIN AS UNIVERSAL CORPORATION AND UNIVERSAL PICTURES COMPANY, INC.), UNIVERSAL FILM EXCHANGES, INC., AND BIG U. FILM EXCHANGE, INC., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

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No. 85

AMERICAN THEATRES ASSOCIATION, INC., SOUTHERN CALIFORNIA THEATRE OWNERS ASSOCIATION, JOSEPH MORITZ, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, ET AL.

No. 86

W. C. ALLRED, CHARLES E. BEACH AND ELIZABETH L. BEACH, PARTNERS TRADING AS BEACH AND BEACH, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

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United States District Court

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

Petitioner,

vs.

PARAMOUNT PICTURES, INC., *et al.*

Defendants.

Equity

No. 87-273.

Before:

HON. AUGUSTUS N. HAND, C.J.,
HON. HENRY W. GODDARD, D.J., and
HON. JOHN BRIGHT, D. J.,
Constituting a Statutory Court.

New York, October 21, 1946; 10.30 o'clock a. m.

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ROBERT E. SHEER, ESQ.,
Attorney for Louis Bernheim Theatre Company.

Judge Hand: Now, we have here various motions listed,
and I shall call the calendar that has been made up of these
motions:

Application of Lust Theatres.

Mr. Schilz: Ready for the plaintiffs, your Honor.

Mr. Caskey: Ready to oppose.

Judge Hand: Application of W. C. Allred.

Mr. Jackson: Ready for the motion to intervene if your
Honor please.

(3884)

Judge Hand: American Theatres Association.

Mr. Arnold: Ready for the application to be presented,
your Honor.

Judge Hand: Society of Independent Motion Picture Pro-
ducers.

Mr. Ernst: Ready for the application.

Judge Hand: Application of Vanguard Films.

Mr. Isseks: Ready for the application, your Honor.

Judge Hand: Radio Center, Inc.

Mr. David Sher: Ready for the application.

Judge Hand: Independent Theatre Owner and Operator Members, by Peter F. Blasl.

Mr. Levy: Ready for the application, your Honor.

Judge Hand: Application of Joseph P. Day.

Mr. Kenney: Ready for the application, if your Honor please.

Judge Hand: Application of Conference of Independent Exhibitors' Association for leave to be heard and file briefs.

Mr. Myers: Present and ready, your Honor.

(3885)

Judge Hand: We will hear this Lust Theatre application.

Mr. Lust: May it please your Honors, we are an illustration in miniature of what this great litigation is about. We, you might say, are the dog at whom the stone has been thrown in this industry. We filed our motion on July 22nd requesting this Court to vacate and set aside and review an arbitration decision of the Appeal Board of the Motion Picture Arbitration tribunals that had been set up by this Court under its decree of November, 1940. We filed that motion for the reason that we had a situation in which a clearance was restrictively relegating us to a very inferior position causing us a loss of around \$100,000 a year.

Now if the Court please, I thought you might appreciate an illustration of a visual presentation of what the facts in this situation are.

Judge Hand: We can't see that we have any jurisdiction over any such application.

Mr. Lust: Well, I believe your Honors do for the reason that it is the decree of the Court which was entered under the Court, by the Court, and the Court set up this agency, and I believe if your Honors will examine the authorities that are set out in our brief you will find that it would be contrary to equity for the Court to establish an agency and relinquish control over that agency.

Our position is— I am glad your Honor came to that point because I wanted to discuss it—our position is that under (3886)

the holding of the Supreme Court by Mr. Justice Cardozo in 286 U. S., the Supreme Court said that where an equity court retained continuing supervision under the Sherman antitrust act, which is an act that applies on a nationwide basis, that the inherent power lies in the Court to control that supervision, to modify, vacate, or change the decree in any effect, and it certainly stands to reason that it retains the power to control the agency set up by the Court.

Judge Hand: Well, you stipulated here that these should be non-appealable and to decide by the decision. We would have to review everything the court has done. If anybody was aggrieved or claimed to be aggrieved we would have to review everything that we have done for the last five years.

Mr. Lust: I would like to call your Honor's attention to *Farragut v. United States*, which is cited in 89 U. S., or 22 Wallace. That was a case where Admiral Farragut had been directed by the United States Government to take the City of New Orleans and to force an entrance into the Mississippi River. He succeeded in doing so but he had the assistance of the Army.

Congress passed a law which allowed Admiral Farragut and his officers to claim prize money as a result of that seizure of ships and stores.

A claim of about a million dollars was lodged with the Government subsequently by Admiral Farragut and his (3887)

officers, whereupon the Treasury Department intervened in the case and claimed that they were not lawfully entitled to it because they had had the assistance of the Army.

What I am coming to is this, that they entered into a submission to arbitration, which was more final and binding in its wording than the submission here which comes under a forced, coerced procedure that is laid on us by the Court. We say that this is a judicial process of the Court; that

this arbitration association was set up as an arm of the court, similar to a master who, under the Federal Rules, must report back his findings to the Court, similar to a grand jury, where the Court retains control over the grand jury. And we cite in that connection the National Window Glass case, which we set up in our brief, which is a Sherman Act case.

In the Farragut case, the submission read that the arbitration should be final and binding as to all matters of law as well as fact, and that they shall become a decree of the Court. The arbitrators awarded \$966,000 and another item of \$46,000, whereupon the Government filed exceptions.

Admiral Farragut and his proponents then claimed that the award was final and binding, and the matter went to the Supreme Court of the United States.

Mr. Justice Miller of that Court said that it was final (3888)

as to matters of fact, but where there were mixed facts and conclusions of law, or where there was a mistake of law, it was not final and could have been reviewed by the lower court as well as by the Supreme Court of the United States.

We point, in our brief that we will submit this morning to any member of arbitration cases where it is said it is the universal and general rule that where there is miscalculation of statistics, as we have by the Appeal Board in our decision; where there is a misquotation of the record, as we have by the Appeal Board in our decision; where there is an assumption solely by the Appeal Board against facts definitely stated by the arbitrator, as we had in the arbitrators' decision; that those are mistakes of error which the Court will review in any arbitration situation.

Generally, your Honors will find, and we point out some of these cases in the brief that we desire to submit, that arbitration is set up by statutory enactment, by legislative enactment. I do not know of any other situation, I haven't been able to find any, any that have gone to the court, where arbitration was established by a court, as an instrumentality

or means or enabling function of the court, but in the statute (3889)

tory situations it has been held that the arbitration is compulsory and unconstitutional unless there is a right of review in the court for mistakes of errors committed by the arbitrator. We cite the case of *In re Compulsory Arbitration*, 9 Colorado, which is not cited in our brief, and the case of *St. Louis v. Williams*, which is in 49 Arkansas, not cited in our brief.

In this industry itself, if the Court please, arbitration was established by joint action of the parties and was held illegal by the Supreme Court of the United States in 1932 in the *Paramount* case and the *First National* case.

There was the same joint action that is admitted of record by the defendants on this motion. The only difference between that situation and our situation here is that they did not have the benefit of a court decree.

Our position is that the Supreme Court has said in *Swift & Company v. United States* that this is not a contract situation; that a consent decree is not a contract; that a consent decree is a decree of the Court with all the force and binding power of the Court.

Therefore, when we submitted to arbitration, we submitted with the conviction that should there be a clear, arbitrary, capricious action by the Appeal Board, by this body functioning at long distance over and apart from the arbitrator, that we could then come to the Court and have the matter corrected, and I am prepared to point out to your Honors nine or more glaring errors in the opinion of the Appeal Board. All the Court has to do is to take the Appeal Board decision and contrast it with the arbitrator's decision and find that the Appeal Board acted without the benefit of the record. (3890)

trator, that we could then come to the Court and have the matter corrected, and I am prepared to point out to your Honors nine or more glaring errors in the opinion of the Appeal Board. All the Court has to do is to take the Appeal Board decision and contrast it with the arbitrator's decision and find that the Appeal Board acted without the benefit of the record.

I would like to call the Court's attention to this, that we have only had one opposition filed here, and that is by the intervenor Bernheimer. By the intervenor I mean the

intervenor in the arbitration proceeding, the party who is contesting us. The eminent counsel here has not seen fit to file any opposition here to our motion, although it has been on the docket for three months.

As I understand the rules 8(d) and 12(h), of the Rules of Procedure, all our affirmative averments, including the averment of concerted action between the distributors and Bernheimer, have been admitted technically, and they have waived all the defenses except the defense of jurisdiction which your Honor directed my attention to.

The Bernheimer defendant has filed an opposition in which, first, he challenges the jurisdiction of the Court, but in the third part of that opposition he submits new matters for the inspection of the Court and submits an affidavit in support of it, and we would call the Court's attention to the (3891).

fact that by submitting the new matter, he has submitted this matter to the jurisdiction of the Court.

Of course, we country lawyers like to observe our rules, and I want to call the Court's attention to, again, Rules 8(d) and 12(h), and the fact that no opposition has been filed to our motion.

Judge Hand: Now we will hear the opposition.

Mr. Lust: May I submit this brief?

Mr. Caskey: On behalf of the distributors who were respondents in the arbitration proceedings, we submit that the District Court has no supervisory powers over the Appeal Board as to any particular decision. Whether or not on an application of a party the District Court could exercise, by modification of the decree or construction of the decree, some jurisdiction over the appeal board or its practices is a question that need not be debated—certainly no jurisdiction of the District Court to review a specific determination of the Appeal Board. If any review is to be entered into, we think the Court will become convinced that the Appeal Board correctly decided the principals involved and applied the facts to those principles.

The Court: Application of Allred.

Mr. Jackson: If your Honors please, this is a motion by a number of independent exhibitors to intervene. There is a (3892)

similar motion made in behalf of the American Theatres Association, in which Mr. Paul Williams and Judge Arnold appear as counsel. Their motion was made before the Allred motion, and I feel that in good faith, and in accordance with our talks with Mr. Williams and Judge Arnold, that they are entitled to proceed, if that is agreeable to the Court. I am not trying to avoid; I am quite prepared to go ahead.

Judge Hand: That is all right.

Mr. Jackson: We did have that understanding.

Judge Hand: That is quite all right.

American Theatres.

Mr. Williams: If the Court please, we have divided our time equally. Judge Arnold will present the over-all legal problems that are involved in the application to intervene, while I will attempt to give you a picture of the practical operation of the exhibition branch of the business, which we think is very material here. I have had the opportunity to observe it at first hand during the past two years, and we think it is very important that certain observations be made.

Being a member of this Bar for many years, I introduce Judge Arnold to you.

Mr. Arnold: May it please the Court, these intervenors, who are represented by myself and Mr. Williams, are two (3893)

associations, the American Theatres Association, consisting of about 6,000 theatres of all kinds, and they are represented here excepting those theatres which are affiliated with the major defendants, and the Southern California Theatres Association, which is a large association in California, representing every type of theatre; and in addition to these associations because of, what we think, is the unlikely chance that it might be held that the Associations were not bound by the decree, we have a list of individual intervenors, representing

chains, small independent theatres, theatres of every type and every situation, who intervened as individuals, and we claim intervention as of right under Section 24 (a) for the sole purpose of objecting to the Court's suggested plan of distribution of pictures by competitive bidding.

I will argue that briefly. We think that we meet all the requirements of Section 24 (a). In the first place, there is no question but that our intervention is timely. It was filed almost immediately after we had notice of the proposed decree. In the second place, there is no question but that the interest of these independent theatres is directly and immediately affected by the proposal of mandatory competitive bidding. (3894)

It will control precisely and in detail the business of these intervenors. It will not only destroy existing arrangements which are perfectly legal and on which those exhibitors now depend, but it also will set up a new affirmative regulation of the industry operating for the indefinite future.

So there is no question about our interest. Nor do I think there is any question but that we will be bound by this affirmative provision of the decree.

And, finally, I think there is no doubt—and indeed the Government admits—that we do not have adequate representation in this situation. The Government itself has proposed, or at least gone along, with the court's proposal on competitive bidding to the extent that it compels independent exhibitors, the Government's proposal, would compel independent exhibitors to bid against each other in situations where the major defendants have no interest whatever.

Now, we take no position on the proposal of the Government that the defendants shall not exhibit each others pictures in their own theatres. Our organization has not been consulted on that point, and so we can take no position on that. But whether or not that be an appropriate provision in the decree to compel us to competitively bid in the situations in which the defendants are not interested, has no relevance to the purposes of this suit.

(3895)

The Government objects to our intervention on the sole ground, that I can see in their letter to your Honor, on the ground that in an antitrust suit everybody is more or less bound by the decree, and we are not bound by this decree any more than in any other antitrust suit where people are incidentally affected by the dissolution of a combination or by the changing of the contractual relationships between parties which the court has declared to be illegal. But we insist that this is not a situation of a party being incidentally affected by the dissolution of an illegal arrangement between two other parties.

This is a situation where the court has gone outside the condemnation of illegal arrangements and has attempted to introduce competition in this industry by telling these innocent parties that they must compete, and as a practical effect, since the distribution outlets, since the channels of distribution are controlled by the defendants, we will be completely and entirely bound by a decree which directs how the pictures shall be sold. We do not think that Rule 28 means that we be bound in the sense of res adjudicata. Of course that would not make any sense because if we were bound as res adjudicata we would have to be parties. This rule, and I think the cases in our brief which I won't bother the court

(3896)

to recite—this rule means bound in a practical and substantial way, so that legal rights which we have in the absence of a decree are prejudiced, damaged, or taken away. And there is no question but what those legal rights are taken away by this decree.

Assume that some other court would in a future proceeding brought by one of these independents, declare that the suggested plan of the court was erroneous. Nevertheless, the defendants in this suit would, we think, as to past action, have the defense that they were compelled to sell pictures by competitive bidding by the order of this court.

And furthermore, if this case goes to the Supreme Court, the effect of *stare decisis* would be even more conclusive on us than *res adjudicata*.

The Government suggests that our rights can be taken care of adequately by a brief *amicus curiae*, and perhaps since the court is kind enough to hear us, that might be true in this court but it is not true in the Supreme Court. We need intervention as of right because one of the most important privileges or rights which we want in this litigation is the right to appeal, and the right to appear in the Supreme Court. It is very doubtful if we could appear in the Supreme Court if the case were appealed *amicus curiae* without the (3897)

consent of all the parties, and there is the equal possibility that the Government and the major defendants might get together and might not appeal. So that we are not protected by the suggestion of appearance *amicus curiae*.

Now if the court please, I want to respectfully suggest what I consider are the errors which this court unwittingly made in suggesting competitive bidding.

I think there are three fundamental considerations which this court overlooked. The first is that the regulation which the court proposes is for the benefit of the wrongdoers, and its principal impact is on the innocent parties who now seek to intervene. Why did the court suggest competitive bidding in this case?

It held that these great integrated producer combinations were lawful or at least could operate without dissolution; that they were lawful organizations, that they did not sufficiently dominate the market so that they should be dissolved. And yet it is clear that the court was concerned about the future operation of those organizations. It was concerned about getting competition in the industry, and so it adopted the plausible device of reaching out and saying "These innocent independents shall furnish that competition and they shall do it for the benefit of two classes of people—first the majors, so that the court would not be compelled to make

(3898)

a more drastic remedy against them, and second for the benefit of the public perhaps because the court suggests that the defendants may be able for some time to operate the theatres better than newcomers.

Well, the burden, we submit, cannot legally be put on us to furnish that competition. We are not guilty parties. We are not subject to the order of this court. And while the order in form directs only the defendants, in substance it imposes a system of distribution of pictures on us for the benefit of the wrongdoers.

Now the second error or misconception which is behind this suggestion of competitive bidding is the notion that competitive bidding can create competition. I think that is a fundamental error in the economics of this decree, and you cannot, of course, in an antitrust decree, overlook the economics of the industry.

I would assert that competitive bidding may be the result of a competitive market, that is, as in wheat or corn, or cotton, or where there are parties of approximately equal bargaining power and where the supply can increase to meet the demand, and where no group dominates that supply. Then, of course, competitive bidding is the normal and natural competitive result. But where groups are not of equal bargaining power, where the supply is restricted or tightly controlled, competitive bidding does not create a competitive market. Instead it intensifies the monopoly domination of that market.

(3898-A)

And the third error, it seems to me, is in the court's conception that there is a product here for which competitive bids can be made. We suggest, and we think our brief conclusively establishes, that there is no standard commodity here; that pictures are not being sold. It is only rights which are of various characters and there is no possible standard except the business judgment of the defendants.

(3899)

And the third error, it seems to me, is in the court's conception that there is a product here for which competitive bids can be made. We suggest, and we think our brief conclusively establishes, that there is no standard commodity here; that pictures are not being sold. It is only rights which are of various characters and there is no possible standard except the business judgment of the defendants.

And if the Court attempts to classify all these various rights so that there will emerge a set of standards or units, we think that the Court will have entered into an unworkable administrative code which will not and cannot work.

And we finally suggest that the result of these errors is to impose the system which will destroy the independents for whose protection this suit was originally brought.

The exhibitors do not want this system. They do not want to go in on a scarce market and cut each other's throats for these pictures which are not enough to go around. There were 437 of these pictures in 1937, 300 in 1945, about ten years later, and there will be less in 1946. Indeed, I think one of the best illustrations of what is going to happen is found in the Film Daily of September 11th where Darryl Zanuck, vice-president and production chief of Twentieth (3900)

Fox, predicted that 40 per cent of the scheduled pictures would be shelved if the proposal of the Court were entered into.

Now, he apparently likes that. He seems to think that there will be fewer medium grade pictures, but I do not think that this Court is in the position to deprive this vast number of theatres of their product on some fanciful theory that the public will get better entertainment. In my view, of course, the more pictures that are produced the better chance of getting a good one. And, furthermore, the commercial success of a picture does not necessarily determine its artistic quality.

Now, what does this mean? It means that the exhibitors will have to pay more and more for a scarcer and scarcer product. Now, why should that handicap be put upon them? Suppose, for instance, that the great tin can manufacturers bought up Del Monte and Van Camps and discriminated against and drove out of business the smaller canners; and suppose the Government brings a suit charging that illegal discrimination because of the domination of the can manufacturers and their combination with the major brands; and

suppose the Court finds the discrimination to exist, and then goes further and says, "We will cure that discrimination. We will put in a provision that the little tanner and Del (3901)

Monte and Van Camp competitively bid for these scarce tin cans."

Well, of course, it might stop the discrimination, but it would do so by driving the little people out of business. Where a product is scarce and tightly controlled, competitive bidding will create monopoly instead of competition. In those situations if codes are to be introduced, or legislation, the only way to preserve competitive bidding is by rationing.

And I further suggest, if the Court please, that this competitive bidding, if it were to apply at all, is on the wrong end. I suggest that it cannot be applied by court decree, but let us take a regulatory situation: You may recall that some time ago great finance houses like Kuhn-Loeb and Morgan-Stanley were charged with dominating the market for railroad bonds and fixing commissions which were unjustified. The Securities and Exchange Commission under jurisdiction of an Act inquired into that situation and decreed that these bonds should be sold by competitive bidding. But that did not mean that the railroads went to Kuhn-Loeb and Morgan-Stanley and made their competitive bids as to which would pay the highest price for that financial service. No, it was the finance houses which submitted the bids to the railroads. If competitive bidding were possible in this situation, (3902)

—and I do not think it did, because, as I have said before, we have no standard commodity—but if it were possible in this situation, the only appropriate exercise of it would be to have the major defendants bid for the playing time of the independent exhibitors. The Court has used this device of competitive bidding in a way that I have never seen it used before. That is, they are supposed to be protecting the independents, but, actually, competitive bidding protects only the recipient of the bid.

Now, I am aware that probably in the Court's mind was the thought that competitive bidding could be used, would be a normal channel to get somebody into the market who was excluded from the market by favoritism; that through that device you had a yardstick which would prevent the exercise of favoritism by these defendants in the future.

Well, in the first place, you do not have any such yardstick, as I will show a little later, but instead of benefiting these independents, it compels them to go into this cutthroat race and pay more and more and more for their pictures.

They must have a constant supply. It turns the independent exhibition into a complete gamble. And not only is the bargaining power of the majors greater because of their financial resources; it is also greater because they do not

(3903)

have to pay for their own pictures.

So they go in with some 20 to 30 per cent of the supply already; and the answer and the only answer to competitive bidding of a weak group for a scarce product is more and more consolidations, chains, and the elimination of the weaker persons. And it was that kind of concentration which was the original evil out of which this final suit resulted.

Now, as I say, in the first place I do not think the Court has the power to put on an innocent party the burden of changing their practices in order that a large combination shall have the temptation to discriminate; and, second, if the Court had that regulatory power, it would be an uneconomic regulation, because competitive bidding is not in itself a competitive market; it does not create a competitive market. It may be the result of a competitive market where the bargaining power is equal and the supply is large. It will create monopoly when introduced in a situation of scarcity.

Now, the third misconception which underlies this suggestion is the idea that there is a possible standard other than the business judgment of the recipient of the bids which will be the major producer in this case—that there was a possible standard to determine this commodity, and what is the best

(3904)

bid for this commodity. The Court in its opinion suggests a number of the factors in the sale of motion pictures which makes such a standard impossible. There is clearance; there is the type of theatre; there is the general plans for distribution; there is the question of whether a long run and a low percentage is better than a short run and a higher percentage. There is the question of whether a percentage price is better than a flat price. The Court has its choice of letting this thing drift without formulating an attempted code for these standards, or to formulate a code. And in either event, I suggest that the decree will be a failure, because, in essence, I do not think that anything more than the business judgment of these defendants can determine the best bid.

And, furthermore, experience, I believe, shows that competitive bidding put in operation for the benefit of people who dominated the market results in collusion just as fast as any other form of market exercise of power.

In the Tobacco case I think the tobacco companies thought for a while that they had a perfect protection against the antitrust laws because all the tobacco was bought on competitive bidding.

(3905)

It was a much easier commodity to standardize than motion pictures. Nevertheless, there were about 120 grades. And it was elaborately regulated. Every basket of tobacco had a ticket on it with the price and the purchaser; and the millions of tickets went to the Department of Agriculture. Yet it was that very system which created the monopoly which the Court found the tobacco companies guilty, of in the Tobacco Case.

And what the competitive bidding did in this case was to furnish a smoke screen behind which these coercive practices could continue.

I suggest in this case, since business judgment will inevitably determine the bid, the Court has, by this proposal, in effect said that the defendants may use their judgment as

to how to distribute these pictures, and as long as that judgment seems to be based upon their financial returns, all the remedies of the antitrust laws are taken away. These independents today are operating, protected by the threats of prosecution, triple damage suits.

Assume that this industry has not learned enough today so that it will continue the practices condemned by the Court. Make that assumption, and the competitive bidding will protect it, I mean, the competitive bidding scheme, will protect it in the continuation of those practices by taking (3906)

away all the other rights.

Assume that the industry has learned enough so that it is not going to drive independents out of business in the ways which it did in the past. Then we have put in a system where the independents are compelled to drive themselves out by cutting each other's throats.

Well, if the Court please, I think I will turn the rest of the argument over to Mr. Williams. I have given you the general conditions. I expect him to give you specific illustrations which will amplify the point.

Mr. Williams: May it please the Court, I feel under a somewhat acute and searching obligation to bring to this Court the plight into which this litigation has placed the exhibitors of this country, and when I say "exhibitors" I mean the independent exhibitors.

I happen to be the man who was directed by the Attorney General in 1936 to make a thorough investigation of the motion picture industry with recommendations. This litigation was the outgrowth of that investigation.

The original complaint in this action was my work, and I was in charge of this case into the consent decree negotiations up until the point where I thought that by that consent decree a provision relating to the sale of pictures was being imposed upon these exhibitors which had no relationship to the action which we were bringing, did not restrain or im-

(3907)

pede or stop the illegal practices with which the defendants were charged; but, on the other hand, would place them under a burden which would make their plight even worse than it was before. That was the provision whereby the producers were prevented from selling pictures in blocks of more than five.

Judge Arnold, who was then in charge of the Antitrust Division, was caught in the unfortunate position of having two sets of advisers with different viewpoints. I, having charge of the trial, believed that that position was injuring the very people whom we were seeking to aid. The consent decree section, on the other hand, it seems, had been having conversations looking toward a consent decree and genuinely believed that that was in aid of the litigation. So there was the split. I remember going to Washington on one or two occasions and trying to convince Judge Arnold that nobody in this industry, nobody, no exhibitor——

Judge Hand: I think this is rather absurd to tell us all about your——

Mr. Williams: All right.

Judge Hand: —housekeeping there. It is very complicated and apparently involved deep divisions among yourselves.

Mr. Williams: Anyway, I had one view and they had (3908)

the other, and I could not go along, and that was what I thought was the end of my relationship to the case, but here I am, back again, trying to tell your Honors the difficulties, not only that that provision brought to the exhibitors, but what competitive bidding will do to them.

A great deal of law has been written in this case and in all of the cases about what the defendants, the distributors, may not do. May not I invite the attention of the Court to what exhibitors may legally do in the purchase of pictures?

I agree that the provisions against the tie-in clauses and all of that are right. The rationale of those laws, as I under-

stand them, is to prevent a seller of goods, who has a patent, or a copyright, or an exclusive right to sell something from forcing a buyer to buy something in addition to that which is beyond the copyright or patent.

But, look at it from the other angle: If an exhibitor wants to buy more than one picture, if he desires to buy a season's purchase of pictures, is there anything in the law whereby he should be prevented from doing so?

(3909)

Now then, under the old system an exhibitor was permitted to buy a season's run of pictures. Under that practice the various distributors in the spring would have a program for the ensuing year. They would present that program at a convention and develop it, and then the exhibitor could buy these pictures in a year's block. The practice in some of them had grown up so that they forced the whole block. But I call your attention to this provision in the consent decree commanding block booking in sales of not more than five. The exhibitors then were up against the practical difficulties of having to buy blocks of five without the possibility of eliminating any pictures, which is an altered form of block booking.

Now out in my association there day after day after day exhibitors have to buy pictures which they cannot use as a result of that provision. Now then, what the exhibitors of the country want is the right to buy an annual sale of pictures with reasonable rights of elimination, and I want to ask this court if there is anything unlawful in such a procedure and if there is nothing unlawful about it should they not, if they are able to persuade the distributors to sell on such a basis, to buy in that way?

But I venture to think that the distributors, having tasted of this new method of selling pictures in groups of five, would decline to do so for the simple reason that it

(3910)
has given them a means of knowing the specific value of each of their pictures, of getting more revenue out of the

exhibitors on account of that, and eliminating the chance of mistake in assessing the true value of every picture.

As the court knows, the making of pictures is a fickle thing. No matter how much money or how much effort you put into the making of pictures, nobody can tell what public acceptance any one of them will have. Under the old system, where they bought annually, the kind and character and quality of each picture was designated so that an exhibitor might have a chance of getting in and making money on pictures that were misjudged. Under this decision, the consent decree, and particularly on what this court proposes to place on exhibitors, all of that will be removed.

Now then, as to competitive bidding where the right to buy pictures is alone limited to the highest bidder, I think if that regulation is put into effect it will remove from this industry every element of stability that has yet reached it. There is more than price that goes into the business judgment of who in the long run will make most money for any distributor—the kind and character of the theatre, the honesty and integrity of the exhibitor, past experience and all of that.

(3911)

Now I don't mind that these customer relations shall be binding forever, because I think you can safely leave it to the business judgment and the desire of the distributors to make money in the long run to go to the theatre that would be entitled to it. But I think to remove all of these other considerations from the buying of pictures is to introduce a chaos into this industry that is greater than any that ever existed before.

Already out there in my country, in California, independent exhibitors have been so concerned with the opinion of this court that those who have been in business for many years are putting their theatres on the market and getting out. They don't think that the future of the industry under such a regulation that this court is proposing to impose on them would warrant them in continuing in the business

when there is an inflated value for the sale of theatres out there.

Now then just a few more words and I will have ended. They feel that the placing of this method of sale upon them, that is, a regulation that is beyond the power of the court, that it tends to encroach upon the legislative field, that if any such regulation is to be made of the industry it should be the Congress and not the courts that should do it, and that the true function of the court as stated in the old Standard Oil case is to enjoin that which is illegal. If there is a (3912)

monopoly they have the power to dissolve it and then let free enterprise and free bargaining run its course.

I believe that within this industry they have the power and the desire and the willingness to correct most of these things if the free sway of enterprise and competition is permitted to them. But for the court to regulate or for the government to regulate it with all of its complexities and all of its difficulties would be to add chaos to what already has become chaos.

Now then I just urge the court to think of that. I know men on both sides—the distributors and all of them. They are men of ability, good will, and I believe that they have it within their power outside of these things that are unlawful, which ought to be stopped, to sit down together and work out something which will be for the good and benefit of all.

The Court (Hand, C. J.): Now Mr. Jackson:

Mr. Jackson: If your Honors please, a great deal of ground has already been covered and I shall try not to duplicate what has been said.

Our motion is in behalf of a number of Southern independent exhibitors to intervene. It is exactly like the preceding motion which has been presented. We too take no (3913)

position in regard to any of the issues in the case other than this question of auction sales of pictures, picture by picture,

theatre by theatre. We are interested in coming into the case for the reasons which have been given and which will be given, to ask your Honor's reconsideration of that feature of the proposed decree and also because your Honors have reserved jurisdiction of the case and questions may come up in the future which would affect independent exhibitors, and then there is of course the question as to whether if there is an appeal we would want to be heard in the Supreme Court on this question.

(3914)

Our immediate petitioners here, some 20-odd in number, are mostly smaller exhibitors, and, in turn, they are acting in behalf of some 2200 independent exhibitors whose theatres are located in the Southern States. They are unanimous in their opposition to the introduction of auction selling. They feel it will do them irreparable damage; that they will lose their good will, and many of them are likely to be put out of business.

There are one or two technicalities in respect to motions of this kind which I think should be spoken of briefly: in the first place, Rule 24 requires that an application should be timely. On that point, of course, this question of auction selling was never an issue in the case—

Judge Hand: I do not think you need to argue that.

Mr. Jackson: All right, sir.

The next point along that line, as to whether the petitioners are represented—on that, very briefly, the Government is presently opposing intervention, saying our interests would be cared for as just a part of the public; and prior to the trial of the case this question was never litigated, so that the issues are not factually before your Honor on the basis of evidence, and the defendants in the case are entirely

(3915)

indifferent, apparently, so far as I am aware, to whether we intervene or whether we do not intervene, or whether there is auction selling or whether there is no auction selling. So I think it is quite clear that we are not represented.

Now, on the question of being bound by the judgment, I should like to refer just very briefly to one additional fact which has already been discussed, and I won't go into it, but I think that is fully recognized by your Honors in your opinion where you said:

"As to these non-party interested exhibitors, while our decision will not be res adjudicata as to these not parties to the litigation, the parties are necessarily and properly bound and indeed the decision is a judicial precedent against the others on the question of law involved in those situations we have referred to where they have unreasonably restrained trade or commerce."

So it seems to me that the binding effect of this decree if it incorporates auction selling on those independent exhibitors has been already recognized by the Court and accepted.

On the question of delay, in view of what your Honor (3916)

said a moment ago, there is no need to discuss that. We acted promptly after the decision came down, and when as soon as these exhibitors realized the full impact of this holding, this requirement that they buy at auction sale, they gathered together in meetings of their associations, and that took some time. They then retained counsel; counsel had to study an extended record and read a great many briefs, and then when retained properly made the motions which are before your Honors.

There is apparently, so far as I can see, no occasion for delay in connection with taking further testimony. I know of no contradiction to the petition which has been filed, and even if testimony had to be taken on the petition, it could be taken with great expedition and very promptly.

On the question—

Judge Goddard: Have you any testimony you would like to offer?

Mr. Jackson: I beg your pardon?

Judge Goddard: Is there any testimony you would like to offer?

Mr. Jackson: Not unless our petition is controverted. If our petition is controverted factually we would like to offer testimony. Otherwise we rest on our petition and the allegations which it contains.

Now, as to the only other point I shall ask your Honors (3917)

to hear Mr. Barton, who is far more familiar with the actual operating of this business than I am; and who can be of greater value than I can be to the Court. I think he will supplement the remarks which have already been made by Mr. Arnold and Mr. Williams to some advantage; and the only other point which I have in mind to make at the moment is that it seems to me that the relief other than auction selling which the Court has directed and will direct, is adequate, and it would seem reasonable to suggest that the relief in these other respects should be tried out before this new practice, this intervention, should be put into effect, at least.

I introduce Mr. Barton.

Mr. Barton: May it please the Court, inasmuch as auction selling is not an issue in the case and was only briefly and casually referred to in the arguments, I want to present to the Court three points which I ask the Court to consider as though I were making a motion for a new trial on after discovered evidence; and since the petition does not controvert, it will not be necessary in our opinion to take any additional evidence. There is certain corroborating testimony already in the record.

The points are these, that auction selling is impracticable; that if auction selling is decreed, it will work harm, (3918)

and we say irreparable harm to our clients and to other exhibitors similarly situated, and, last, it will be of no benefit to the public.

Now, the first point, the impracticability of auction selling: As the Court knows, the exhibitors have to form their program in advance. They have to determine whether they are going to have——

Judge Hand: Let me ask you whether you can think of any other system that would give a wider opportunity for pricing these films.

Mr. Barton: Our reply to that, sir, is that if the Court will permit its mandates in respect to the other points to operate, that they will satisfy the demands of the Government; and I should be very glad to take those up one by one and show you how we think they would be effective to satisfy the same matters of which the Government complains. We cannot suggest any other system, except let those take effect, and then let the barter and trade and free competition and such things also take effect, and we believe that will satisfy the situation.

The exhibitors are unanimous in feeling that that is the case. That is the first time I have ever seen them unanimous. The south and the north and the east and the west have gotten together in opposition to auction selling, believing, as (3919)

I say, that these facts that I want to present to you had been before the Court at the time it considered auction selling, the impracticability of it, and the damage it will do to the exhibitors, and the failure to help the public—had they been before the Court, the Court would not have made this direction; and we have no other plan to offer except the one I suggest. What the Court otherwise decreed will be adequate for the purpose.

Now, shall I proceed?

Judge Hand: Yes.

Mr. Barton: Now, if you are going to have competitive bidding—we have called it auction selling because there are a few references in the record to auction selling—the first question is how many auctions ought there to be, in each city, at the same time, or at different times? How many times a

year? Are the auctions to be held in the spring or fall, or every month, or when? Will all the producers be asked for bids at the same time or at different times? These are practical suggestions that the exhibitors have brought to us. Will bids be made by mail, or will you have a room in which the bidders will get up and say we offer so much for this picture, and he offers so much, and probably knock it down just like you do real estate or personal property?

(3920)

How are you going to arrive at the minimum price when one man says he wants his picture for varying runs, as they say, we want it for five days, ten days, twelve days; we want it for what we call preferred playing time, that is, holidays; or we want it at this time or that time? Another man says, We want to bid for the picture on varying runs. Things of that sort. In other words, if we understand the decree, the exhibitors say to the producer, "We would like to bid for this picture, submit a bid, and we want to submit the bid to run for certain days, or for so many days"; another man says other times and for so many days. All these varying requests have come to the producers.

How is the producer to determine how many offerings he is going to make at a minimum? Is he going to make one or a dozen? Is he going to try out the first suggestion of an exhibitor, and then a second, and then a third? It just ties itself up until we see no out for it.

Under those circumstances, if there are no bids at the minimum price what is this producer going to do? Is he going to make another offer, after his minimum price is so high and nobody wants it at this price? Is he going to come and say, "I offer it again"?

Then, if the Court please, let us consider the number of bids. Exhibitors now offer 50 to 300 features a year, de-

(3921)

pending on the number of times they change their programs. They need from 150 to 900 shorts. That means that each exhibitor, depending upon the number of changes in his

program, has got to make from 200 to 1200 successful bids, and I say successful. He will have to put in innumerable more bids in order to be assured of from 200 to 1200 successful bids.

By what standard is the producer to determine when bids shall be accepted? Here are a few of the varying things that may enter into a bid. One exhibitor may bid a flat amount, another, a greater or lesser flat amount. There may be all sorts of flat amounts. They may be for varying percentages of gross receipts, 20, 25 up to 40. There may be varying sliding scales in the bid. There may be varying practice and varying guarantees.

What is to be the measuring rod by which a producer can determine which bid he should accept?

By what standards of the sellers, the distributors and the producers, to determine the adequacy of the theatre as to location, size and equipment? Among a few of the other things that will have to enter into his judgment, those would be some of the consideration. All those things are going to delay in awarding bids. A seat not sold is gone forever; a picture not sold, when it is popular and when people know about it, and expect to see it, loses a great deal of its value.

(3922)

By reason of all these complications that I have suggested to the Court, inevitably there will be delays in awarding pictures, and that means that these pictures are going to lose a great deal of value.

In addition to that, an exhibitor will not be able to arrange his program because he does not know until his bid is awarded what picture he is going to get. He will never know whether he is a successful bidder for a dozen pictures, or whether he hasn't got enough pictures.

Here are five or eight or ten distributors asking for bids. He puts in all of these bids. He won't know whether he gets a dozen awards or one award. He will be in a complete state of confusion as long as this system lasts.

And then out of all this, inevitably, there are going to arise innumerable controversies. The unsuccessful bidder is going to say to the distributor, "You treated me wrong and we want to see your books. I would like to know how you gave Mr. Jones over there a picture when I thought mine was the best bid." There you have a controversy. And even if it goes to arbitration, it is a controversy, and, inevitably, out of the impracticability of this situation, innumerable controversies are going to develop.

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In the meantime, what is going to happen to the picture? You may hold up an award of the picture by some court action, or arbitration, or any number of things may happen, not only to the detriment of the exhibitor but to the detriment of the distributor, who wants the picture displayed while the picture is ripe and ready for public introduction.

So much for a number of the things which make, in our opinion, auction selling or competitive bidding impractical. We just don't feel it can be worked out practically.

We have worked with it, we have tried to figure out some way, and we all came to the unanimous conclusion that it cannot be made to work practically. But suppose someone can work out a way to make it work practically, or we think it works practically? Or we think it could be made to work? What is going to be the effect on the exhibitors?

You may say, or somebody may say, that then these points I am going to bring up are somewhat speculative, but they are unanimous judgment of people who have been in the business for years; they have risked their fortunes and they have spent their lives in the business, many of the kind who started off with six runs for a nickel in the little stores which

(3924)

were gradually converted into motion picture houses, and then have gradually developed from that stage into a comfortable and modern theatre. They know what the effect of certain actions will be upon their business from experience. They are men of experience who know that if this is done, this

result will follow, and they say, with unanimity, that if auction selling is imposed upon them, these results, among others, will follow.

My friends have already alluded to the fact that it will foster monopolies. It is perfectly obvious that the theatre operator who has the most resources and the best theatre, and usually the two come together, is going to make the highest bid, most successful bid. He is going to get all the good pictures, and, as the Court knows, all pictures are not good. A producer may spend a good deal of money on a picture and think he has a swell production which will have vast popular appeal, and then when he shows it in the theatres he finds it is a flop; or he may spend little money on some picture and it grew to be a great success. If the Court wishes, I could give you names of pictures. But, to get along, ordinary business practice will inevitably result in the best financed operator getting the best pictures, leaving to the less financially strong house the poorer pictures.

Under the present system, by the course of barter and (3925) trade and negotiation, the smaller houses do get first run pictures. They may have, over a period of years, a course of dealing with some producer which has been beneficial to the producer and beneficial to the exhibitor. The public is accustomed to going to see certain types of pictures, and he will have had a good first-run picture one week and next week he may have a poor first-run picture. Under this system it is inevitable that the big man is going to get all the pictures and the little fellow is going to be reduced to a second, or sub-run house, or what is known in the trade as a slough house.

Under this decree, may it please the Court, the defendants enjoy an immediate advantage. They may display in their houses the pictures they produce.

On the present production we roughly estimate that they may have as much as six month's production. They can show pictures without auction bidding, without going into the market and subjecting themselves to the hazard of the auction

block; they can show six months of pictures, and by stretching it in the bigger cities, we estimate they will probably have enough production to show a whole year; in the smaller cities and towns, of course, that isn't true.

They already have one strike against the independents (3926)

because they know that the independent has got to bid and bid well to get that picture which they have put on the auction block in order to have something to show against his picture. It is human nature that they are going to charge more for it. It is human nature that those film rentals are going up.

All the factors that I have narrated are going to enter into distribution.

You have to have, I don't know how many people, auctioning these pictures off; you have to have a lot of exhibitors getting ready to submit bids, and all those things are going to increase the cost of the films.

And then, under the decree of the Court, a distributor cannot take into account those things which apply in any business enterprise, in any course of dealings, that is, to name a few, the reputation of the man with who you are dealing for honesty, integrity, fair dealing, efficiency, cooperation, and a record of his past transactions.

Now, to cover the risk that you are bound to take, You may say he is a responsible bidder, but he may have a lot of money and be a very difficult exhibitor to deal with. To cover that risk, inevitably you are going to add something to the price, your minimum price, and that is another reason why your film rentals are going up.

(3927)

And then I come to a most important item, it is not a matter of contract, but as a matter of verbal understanding and of trade practice indulged in and, necessarily so, by all the producers and all the exhibitors. A producer comes along, a salesman, and says, "I have a fine picture, one of the best pictures. It is going to do a whopping business, and

I want this price for it." Under the present system the exhibitor says, "I don't think all those things are true. I will pay you this." And they trade, and finally arrive at a price, but the distributor also says to him, "If this picture does not turn out to be what I say it is going to be, what I prophesy, then I will give you an adjustment." Those adjustments arise from the fact that the picture is not what the producer thinks it is going to be. It may be because of the territory in which it is shown. For instance, "Young Mr. Lincoln" was popular in the North; in the South it was not a particularly popular picture. They thought Woodrow Wilson was going to be a great hit, but I understand it was not the box office hit they expected. Those pictures were sold on some high basis to exhibitors, and when they proved not as productive and not as popular as was stated, the producer comes along and says, "I will adjust what you have agreed to pay me." They found that good business. That is uniform throughout the industry. It is an accepted trade practice. I mean the (3928)

return of thousands and millions of dollars to the exhibitor, because these exhibitors are people they want to keep in business. They have found in experience that they are good exhibitors, they know how to do business, and it is profitable from both ends that these adjustments should be made. But there may be other reasons for adjustments in addition to the poor drawing power; there may be bad weather, a circus may come to town, or there may be a fire; there may be a power failure, a strike, and various other attractions which take away from the drawing power of that picture at that particular time.

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You can't always book a picture, may it please the court, for the precise time you want it because prints are limited. In those events there are post-exhibition adjustments. Now those would not be possible under this system.

Now there are a number of additional injurious factors. I have already alluded to the fantastic number of bids that

each exhibitor would make, I have spoken of over-buying and under-buying. I have not mentioned double features. There is considerable difference of opinion in the trade as to the advantage or disadvantage of double features, but if he has got to buy pictures by auction bidding, he will not be able to show two pictures because both pictures will cost him a higher price. He is able to do it this way because he buys one picture at one price and the other at a higher price, and averages the two. But under this auction selling he will be unable to arrange his program. He may buy all Westerns. It would be ruinous for an exhibitor to buy all Westerns, buy one Western after another, except certain exhibitors in small towns where they have action pictures on Saturday nights. He may buy all historical pictures or he may have multigraphs. He will not be able to arrange his program. An exhibitor has to schedule his program so that it will be attractive. If he is a second-run house he will perhaps want (3930)

to follow within a reasonable time after the first-run house. He would want to do something to make his program more attractive. It is a showmanship business, and you have got to properly prepare your program. And these exhibitors do not know how they will be able to arrange their program because they don't know what pictures they will have and what pictures they can expect to have.

So much for the damages it will do to the exhibitor.

Now coming to the public, I have already pointed out to the court that inevitably the small first-run houses will be converted into second-run houses and sub-run houses. At the present time you can go to a neighborhood house and see a good first-run picture because it is not in a competitive area and does not interfere in any way with the downtown house.

I think in this particular situation there are two theatres. You might call them faith and hope, because they have been built up by the exhibitor from faith and hope over a period of years. One has a seating capacity of 700, another say of 800, making a total of 1500. At the present time they are

able by negotiation to exhibit first-run pictures day and date, that is, simultaneously. There is in that same town a picture theatre of 1200 seats.

(3931)

Now under auction bidding, if they each ask for first-run only and there is only one first-run awarded to that town, as is usually the case in a town of 150 to 200 thousand, that big theatre is going to get that picture. That is just an illustration of a point I made before. But it seems that the neighborhood houses are going to sink down. They can't vary their prices according to their pictures. The public is accustomed to paying a uniform price at a theatre and seeing one week a good picture and the next week a picture that is not so good. Should they be fortunate enough to get a good picture they will pay a higher price but in the meantime they will have slumped down to a second or third or sub-run house, and the public has got to journey down-town to the larger and bigger houses.

I have already said that inevitably the cost of films is going to increase. Well, there is only one thing to do about that, that is to pass it on to the public. So admission prices will inevitably increase.

I have spoken of the inevitable deterioration of picture houses because with the uncertainty of what picture they will have they will not be able to arrange their pictures attractively, and that is the assence of showmanship business.

And finally, as far as the public is concerned, no one as

(3932)

far as I know has asserted that the auction selling program would give the public better programs or lower admission prices.

Now may it please the court, some six years ago I appeared here at the behest of certain exhibitors some of whom I now represent, and on their behalf I pointed out what we considered harmful provisions of the proposed consent decree. It was generally stated then among the exhibitors that they did not believe the consent decree would be sufficient to accomplish the purposes desired by the Government. As

you know, the consent decree was entered. Our prophesies came too true. Mr. Williams has pointed out the results of the block booking provision which we violently opposed. As a result this trial was had last fall, and your opinion was handed down. The exhibitors were pretty unanimous, and in their forecast they were pretty correct. As I said before, I have never seen such unanimity among the exhibitors. They were unanimous with few exceptions and those exceptions can be explained away by economic facts. You can't put a theatre in a field and expect the public to go there. You can put a theatre in an open field where you can drive out with a girl, that sort of thing, but you can't build a million or a million-and-a-half-dollar theatre in an uneconomic location and expect it to do business.

(3933)

If the court had time, we would go into these rare cases, but the rest of the exhibitors, independents, affiliates, and the like—and under the court's decree I anticipate there will be very few affiliates—they are all pretty unanimous. There are now about three thousand theatres that are wholly owned or might be affiliates. Under the decree the affiliates have got to divest themselves. Either they have got to sell or not sell or buy. What you are actually doing under this decree when the time comes if the owners of the affiliates should have to buy out the owner's interests, they too would be affiliates. And under this decree to reach these defendants you are imposing the stricture of auction selling, this uneconomic thing on some fifteen or sixteen thousand other theatres to reach probably what will be only fifteen hundred theatres. And I say there is abundant law in the land to take care of these situations if unjust conduct should result.

The Crescent case, the Interstate case—those cases—plus the injunctive provisions that the court otherwise proposes in this decree will, we think and believe, be adequate under the circumstances.

And I say in conclusion, why require these independents to buy their pictures by auction selling when we believe it

(3934)

is not needed to secure the desired results, when we believe it will not accomplish the desired purposes, and as far as we know, no one wants it.

The Court said of its consent decree in this recent hearing, the only people the court knew that wanted it was the Government and the defendants. No one wants the auction selling that I know of. It will work irreparable damage to the exhibitors whom the purpose of this proceeding is to benefit. And finally, it will not help the public.

We ask that you strike this provision out of any decree you may enter.

Judge Hand: Now, Mr. Barton, you made a very interesting argument here I think. What I would like to ask you if you are willing to answer is whether your clients were satisfied with things as they were. I believe they didn't like the consent decree—the five picture business—but they were satisfied before that, or are they people that have been complaining?

Mr. Barton: As far as I know, no, sir, none of my clients have complained of the present system of doing business, and they feel that they can by barter and trade and the sense they may put in their transactions properly and efficiently conduct their negotiations with the distributors.

(3935)

Judge Hand: Then fortunately or unfortunately you do not represent the class that objects to the status quo. They are well satisfied. But there seems to be a very large class that does.

Mr. Barton: As to those—and there may be among my clients—these 20 representatives of two or three thousand theatres, there may be a number of whom I do not know who do object. You asked me if I personally knew. But they have said in meetings that they believe that the other strictures which the Court proposes to impose will be adequate to take care of the situation. They think more harm will

result to them from auction selling than will be gained by that.

Does that answer your question?

Judge Hand: Yes.

I think we had better hear the opposition now to these motions to intervene.

Mr. Wright: Do I understand that the defendants have no objection to these interventions?

Mr. Davis: No, you do not understand. Our position in a nutshell, if your Honors please, is this: We cannot consent to these interventions by virtue of which the intervenors would become parties to the suit. We do not think they follow either the mandatory or the permissive clauses of Rule 24. We are, however, perfectly willing that the Court (3936)

shall hear them as amici and shall receive any information or light that they can give the Court with reference to the formulation of the decree. We have not seen fit to traverse the petitions. Indeed, a pleading to a petition to intervene, by way of a denial, traverse or whatever, is procedure entirely unknown, I think. We neither admit nor deny, therefore, what their petitions contain. We stand upon the proposition that our entire good will may be heard by the Court, but we see no reason for making them parties to a litigation which already has a considerable number of parties, and quite a large volume of legal talent, agreement among whom is not always easy to obtain. I do not see why these intervenors should look forward so hopefully to the right to appear and be heard on argument in the Supreme Court. They can be heard in the Supreme Court as amici. They probably would not be heard orally. My impression is that if the case ever reaches that posture it will be possible to produce from the ranks of the Government and the defendants all the oratory to which the Supreme Court would be willing to submit.

Mr. Wright: If the Court please, I think Mr. Davis has stated what is substantially our position, that the letter that

we wrote the Court as to Mr. Arnold's petition, of course, also applies to the Allred petition.

(3937)

There is just one further thing I want to add here, and that was the point raised by your Honor that these people and any of them represent no one but themselves. There are a very substantial group of exhibitors who have interests quite different from theirs, who have views quite different from theirs as to what ought to be done here. Now, we submit that all of these views should be entertained by the Court in the form of such amicus briefs that they would care to file, but the effect of making them parties would simply be to hopelessly confuse the litigation without in any way aiding the solution that the Court has to arrive at.

Mr. Frohlich: Your Honor, on behalf of Columbia I should like to be heard for a moment with respect to the intervenors. Columbia has no objection to the A. T. A. or Mr. Jackson's clients, or Mr. Williams' clients intervening. I think they should be in this case in view of the radical nature of this decree and the effect of it upon thousands and thousands of smaller exhibitors. I think they ought to be here; they should be heard; they should be permitted to have such standing as will let them argue in the Supreme Court, and I am sure that no harm can be done to any of these defendants by this intervention. I think the Supreme Court will listen patiently to 15,000 exhibitors in this case.

(3938)

Mr. Arnold: May I only say in reply that I did not argue the cases. Our cases are found in the memorandum to our motion to intervene, and I take it the Court would rather read those cases than hear me talk about them.

Mr. Davis: May I in connection with that remark of Mr. Arnold say we have an eight-page memorandum in which these cases to which he alludes are somewhat discussed on the question of law. The question of whether or not these interventions follow the scope of Rule 24; and with your Honors' permission we will hand up this memorandum.

Mr. Proskauer: May I ask what your Honors' desires are with respect to the substance of these suggestions that have been made? It has been our intention not to discuss them on these preliminary motions to intervene, but to refer to them when we come to discussing the decree itself; and if that is agreeable to your Honors, we will follow that course.

Judge Hand: Well, I should think that is the thing to do. I think that we should either allow them to intervene or allow them to file briefs. As I look at the thing now, it would be the latter, just amicus briefs, and not intervention. As I understand the law, I do not think it is necessary, but (3939)

we still look at these briefs that will be submitted, and then there will be presentation of these objections, in either event, of course, on the settlement of the decree.

Now, of course, the decree itself is objected to, this auction selling business, by the defendants other than the major defendants in the case. The major defendants either no longer particularly object to that, or are in despair over their condition or the condition of the Court, or something.

Mr. Proskauer: No, your Honor. We say nil desperandum. We are not in despair. I think we will make that clear when we come to discuss the decree.

Judge Hand: The application of Society of Independent Motion Pictures. That is just a motion.

Mr. Ernst: Yes, to file a brief amicus, and I want to be heard just for a few minutes.

We represent the independent producers who have been scarcely mentioned in the proceeding here today. This is a group of about 20 producers none of whom has the power to dominate the market either by the control of theatres or by horizontal agreements with others. They are not parties to the case; there is no accusation against them. The testimony shows that they in effect are the ingenious outside free enterprise operators who have been able to survive in a market

(3940)

place dominated either by brick and mortar or horizontal agreements.

In answer to your inquiry, in effect, what other horses there are in the race other than the horse of competitive bidding, it seems to me there are two horses in the race, as to one of which we make no comment. That was the horse put in by the Government with respect to the divorce of brick and mortar from production. And on that we make no comment. But it does seem to me that now no matter what the decree shall be, this Court should make certain that those independent operators who together amount to a product equal to one major, should not have their hands tied, because they have been guiltless, and it may well be that your choice now is a kind of public service commission, arbitration board, running an important industry forever and a day, or the injection of free enterprise and competition into the industry by the independent exhibitors and the independent producers being allowed, as all people in business are allowed to do in the United States, dealing with copyrights, dealing singly, and without the domination of brick and mortar theatres, to make arrangements either auction bidding or no auction bidding, auction bidding with a concealed multiplicand or a disclosed multiplicand, fixing all prices by agreement. And (3941)

it seems to me that the only hope of this industry, once having passed your major premise on brick and mortar, is the hope that free enterprise can be injected by this prominent, ingenious group of independent producers who make the pictures peculiarly of merit, as testified to by one of the attorneys for the defendants.

I may say a word about the public in relation to this concept: You have a clear analogy to this kind of an industry in the book field. In the book field there are special editions gotten out, \$10, \$12, limited editions, which are in effect clearance and run, because without clearance and run to protect the \$10 special limited edition, there could be no such editions, as against the 25-cent reprint if it came out at

the same time. There is no trouble within the book industry to establish and perpetuate a free competitive market for consumers, because by and large there has neither been any group of producers who have been able to dominate an area by retail outlets, and there has never been permitted horizontal agreements of the courts to thus control the marketplace.

What we have in mind is just one simple thing, that whatever decree is written, there must be taken into consideration the fact that the opinion is more than an opinion in regard (3942)

to eight defendants. It lays down, perforce, a pattern for an entire industry. This is the one corrective impulse in the industry, that if it is allowed freedom of play in the marketplace, freedom vis-a-vis exhibitors who are also free and operating individually and not in cahoots with the conspirators, that impulse may be your greatest corrective toward freedom.

For example, there is no reason why if the position of the independent producers and independent exhibitors is not fully protected, no matter what the decree may be, why the independent producer won't be able to shop around for an exhibitor or the exhibitors shop around for independent producers, either on an auction basis, a disclosed price basis, an agreement admission basis, a clearance basis, as long as no one exhibitor and no one of these producers has the power to dominate the marketplace.

Now, what will that mean to the consumer? It means that some exhibitors will be able to stand up and put a sign on their doors, a dollar admission. What does that mean to the public? That means that the exhibitor is doing what he has a right to do, to say to the public you are going to average up. When you come to my theatre you are going on an averaging basis. You are not buying pictures by picture; (3943)

you are buying for a dollar, whether the picture cost a fortune or nothing, whether it is good or bad. That certainly

is within the realm of free enterprise if the exhibitor wants to take that hazard.

On the other hand, exhibitors say, "No, I want to compete picture by picture, and I will find an independent producer who will let me have his picture at a 90-cent or a dollar admission." Now, what is the hazard of that competition? That merely means that if that independent exhibitor has dealt with a Disney or Goldwyn, or a Selznick, or a Cagney, or any one of these great independents, both the producer and the exhibitor have taken this hazard. They have pegged the price at a dollar by agreement which is lawful, but they run the risk that across the street there will be a picture at 90 cents which will find more public favor.

That is exactly what happens in other fields, and it seems to me clear under the cases that there is no illegality in such an agreement if there is no horizontal accord and if there is no domination of the marketplace by the ownership of brick and mortar. And even if it be short of domination of the marketplace by brick and mortar, the brick and mortar cannot but have an effect on the horizontal dealings in the neighborhood of the theatres owned by the majors.

(3944)

I should imagine that all we are asking for is just one simple consideration. Not being guilty, being competitive, being the ingenious branch that has been able to stand up against such a monopoly of conspirators, no general pattern of the industry should be laid down without leaving clearly open that none of these restrictions have any impact on independent exhibitors who want to buy from these independent producers, and independent producers who want to sell to the independent exhibitors. And that, if you please, having passed your major premise which has driven you to auction selling, the major premise as to the brick and mortar, as to which we say nothing, it seems to me that is the sole corrective left to encourage the expansion of that market so that the public will buy picture by picture, and exhibitors will be free to buy by auction or not, by price, by run, by clear-

ance, any terms they see fit, as long as the seller and the buyer have no position in the marketplace capable of dominating any competitive area.

Judge Hand: Vanguard Films.

Mr. Isseks: May it please the Court, I appear on behalf of Vanguard Films, an independent producer of motion pictures. Vanguard has made a motion for leave to file a brief *amicus curiae*. This brief is directed to one single problem, namely, the need of a road show exception to the (3945)

provisions of this judgment. And I submit to your Honors, from my understanding of the briefs filed by the parties, and the record in this case, I believe that insufficient consideration has been given to that problem. The facts appearing in the petition filed by Vanguard show clearly that if there is no such exception for road shows, there will be an undue burden on all producers of outstanding, exceptional and costly feature motion pictures, and there would be, particularly, a tremendous hardship on my client, Vanguard Films.

Now, your Honors, it is most significant that the consent decree which had provisions restraining the five major defendants from certain practices in connection with the distribution of motion pictures, excepted specifically road shows from any phase of the consent decree.

Now, your Honors would like to know why my client, Vanguard Films, has a real and vital interest in the question of exempting road shows. Vanguard Films has as its executive producer David O. Selznick, who has been known for many years to the public and to the industry as a pioneer of high quality and exceptional motion pictures. It was he who produced "Gone With The Wind" which as of 1939 cost more than any picture made up until that time. Van- (3946)

guard is a very small producer of motion pictures. It makes either one or two pictures a year. It is not controlled directly or indirectly by any of the eight defendants. For more than a year prior to June 11, 1946, the date of this

Court's opinion, Vanguard had in production a picture called "Duel in the Sun." The picture today cost five and a half million dollars. Practically all of that expense was incurred on June 11, 1946. It was contemplated that that picture would be road shown, and if there is an injunction here against price fixing as to any picture, including a road show picture, Vanguard will be seriously harmed because it planned to road show that picture beginning December 15th, after first having a premiere in Dallas, Texas. In addition to the cost of making the film, which was about five and a half million dollars, Vanguard has already spent a million dollars in advertising. Vanguard planned to do something that was traditional in the industry.

Now, your Honors, as I understand it, and as I understand the record may even show in this case, for many years when you have an exceptional picture, and particularly when you have a costly picture, you road show it in selected theatres, in selected cities at increased admission prices, and (3947)

the producer through his distributor fixes the increased admission price. I should have pointed out, your Honors, that we release under contract through the defendant United Artists. I also understand that the record shows that since about 1938 only four pictures have been road shown.

Judge Goddard: Altogether?

Mr. Isseks: Four.

Judge Goddard: Altogether? Does that include all road shows or only those of your client?

Mr. Isseks: No, of all the defendants, I understand. I understand in finding of fact 31 submitted by the five defendants, it shows that only four pictures were road shown. If I am wrong I will be corrected. I will tell you what they are: Gone With The Wind, For Whom the Bell Tolls, Wilson, and the Song of Bernadette. One of those was produced by my client—I think maybe two—but the producer, as a rule, your Honor, has not road shown pictures unless they are very expensive or very unusual.

Now, as I pointed out to your Honors, the consent decree excepted road shows completely, although there were restrictions in the decree. The Government in its original petition made no criticism of road shows, although they defined it. The Government in the amended petition made no (3948)

criticism of road shows although they defined it, and I understand during the trial of the case, your Honors, the Government did not attack road shows as such.

Judge Hand: Is Vanguard entirely independent?

Mr. Isseks: Yes.

Judge Hand: Affiliated with no one?

Mr. Isseks: It distributes through United Artists. It is not controlled directly or indirectly by any of the eight defendants. We do release under United Artists under a contract made in 1941.

Now, during the trial of the case I understand the Government made no attack upon road shows. They did, of course, offer evidence that special privileges were given to certain large groups of theatres, either affiliated or non-affiliated, where there were special road show privileges; and it is significant that the Government's brief on page 10, in pointing out that while commercial exploitation of the ordinary feature film involved other forms of entertainment, they specifically state that road shows do not involve any other form of commercial exploitation.

Now, your Honors, I come now to the legal questions involved—

Judge Hand: Why do you have to fix the price?

Mr. Isseks: We want to get our money back, your Honor; (3949)

that is what it comes down to. I will explain it to your Honor very simply. When you have—

Judge Hand: Why is your client in such a pitiful state as compared to the other people—

Mr. Isseks: Your Honor, my situation—

Judge Hand: —they do not say that this will ruin them.

Mr. Isseks: I think they have submitted a road show exemption, your Honor. The five major defendants have submitted one which would benefit them only, and I think that does not go far enough because it will really increase any economic advantage it now has. Our exemption, we suggest, is not only for ourselves; we suggest it should be applied to the industry, or, in the alternative, to the three minor defendants; or in the third alternative, to those pictures which were in production on June 11 and which were costly.

I come now, your Honors, to what I think are the legal questions involved: The only possible objection to road show exemption would be that the defendants—and I include all the eight defendants—would be able to fix the admission prices of the picture in a theatre. Now, we submit, your Honors, that there is no case holding, including your Honors' decision, that the fixing of admission prices by a single producer, including the defendants, or a single distributor, including the defendants, constitutes a violation of the Sherman Act (3950).

man Act.

Now, certainly, your Honors, the General Electric case which your Honors cited in your opinion has held that a patentee may fix the price which his licensee may sell the article to the public; and the Supreme Court, your Honors, in the Interstate Circuit case, which your Honors cited in your opinion, at least inferentially indicated that a distributor might fix the admission price at which his exhibitor would show the feature film, provided that the admission price did not include the admission price for that of another feature film.

Now this Court, in its opinion said:

"Nor need we now decide whether a copyright owner may lawfully fix admission prices to be charged by a single independent exhibitor for the exhibition of its film if other licensors and exhibitors are not in

competition. As other licensors and exhibitors are always in competition"—

the word here is "contemplation", but I think it is a misprint and should be "competition"—

"as far as we can see the question would appear academic."

Now, your Honors, I submit it is not academic as far as exceptional, costly pictures are concerned.

(3951)

Judge Goddard: What is the difference in principle between a less expensive picture and one that cost a great deal of money? What is the difference in principle?

Mr. Isseks: I think your Honor has to meet the economic conditions in the industry. Your Honors have gone on in the sentence preceding the one I read and said that any copyright owner may fix the admission prices and fix any other condition in his own theatre, which means that the five major defendants have an economic advantage over us. They can now take—take Paramount. Paramount can take its costly picture and put it in its own theatre and charge any admission price it pleases because it is a copyright owner. We can't do that. First of all we have to distribute through one of the eight defendants; secondly, we do not own any theatres, and it seems to me that where there is economic advantage which they now have and which the decree is going to continue, we ought to be put at least on a parity with them, and we say when you come to an expensive picture—and there is a public interest in expensive pictures—and your Honors are aware that this industry has had advantages in the art only by reason of the fact that somebody has come along and taken either a work of art or a play, or a well known book, or something of public interest, and he has made (3952)

an unusual picture out of it. In doing that, he has to first make it long, as a rule, and secondly he has to spend a lot of money—

Judge Hand: Well, you say you are entitled as an independent producer who has not been a bad boy—there is nothing against you up to date—to fix these things—

Mr. Isseks: Your Honor, I go further. That is one of our—

Judge Hand: —and that these other bad people can't perhaps, can't under our decree.

Mr. Isseks: I say they can as to their own theatres, and I say if they can as to their own theatres, they have an economic advantage:

Judge Hand: Yes, they can as to their own theatres, that is right.

Mr. Isseks: And they can raise prices as they please.

Now, under your Honors' decree, United Artists, which has no theatres—I think they may have a half interest in one or two theatres on the West Coast—but under this decree, their economic advantage as to their theatres is going to be continued, as to road show pictures, expensive road show pictures.

I ought to point out the tradition of road shows. A picture is road shown because only in that way can the man who (3953)

makes the expensive picture recoup his unusual cost; and there is only a limited number of patrons in the country, a limited number of seating capacity, and if he has got this high cost, he has in the past, and as the consent decree recognized, been able to go out and do something different.

Now, your Honors might say well, if you permit this exemption broadly applying to all the defendants, everybody, they might use this exception as a means of evading the prohibition against fixing admission prices. We suggest four ways, four conditions that could be added to your definition of road show which appears on footnote 1 of your opinion. One condition goes to requiring a picture to be costly, a certain cost over the average cost. Another condition would be to fixing increased admission prices. A third would be with regard to tying in other pictures. You would have to

road show only one picture; and the fourth condition would be only that one producer could road show two pictures a year, although, as a matter of fact, you never get that high. History has shown that only four have been released by these eight defendants in the last five or six years.

Now, your Honors, I just have two other things I want to say: I think I have touched on them already, but it will only take me two minutes. There are three ways of handling (3954)

this. I think it is a very vital and important thing to the independent producer, particularly to my client. One way of handling it is to have an exception for all the defendants and those who must distribute through defendants, have a flat exemption that this decree shall not apply to road shows as hereinafter defined, and define it, and I urge that.

The second way of doing it would be at least to make the independent producers on an equal level with the five majors, and that is to have the exception apply to the three minor defendants and those who released through those three minor defendants. As your Honors know——

Judge Hand: Is this in your memorandum?

Mr. Isseks: Yes.

(Continuing)—the third thing, your Honors, is that your Honors limit the exception to pictures on June 11, 1946, or at least in production, so that people like ourselves and maybe others like us won't be hurt by your Honors' decree.

One other comment I think is important. I think the Government and the defendants ought to state their position on this. It does not appear in the briefs. You can look at your Honors' opinion, and look at the briefs filed, and look (3955)

at the record, and there is nothing to show what the Government's view is on this road show problem, and there is nothing to show what the defendants' views are.

Now, they have submitted something which I do not think would help the independent producer or the three minor de-

fendants; it would help them only; and as to that if I have any position here at all, I object.

Thank you very much.

Judge Hand: Do you want to say anything about this, Mr. Wright, or do you want to take it up on the settlement of the decree?

Mr. Wright: I think since we have the next two days to say what we have to say, I rather hesitate to encroach on the time of the other non-parties. I suppose they all ought to be heard first.

Judge Goddard: Can you say whether you are opposed to the position just heard?

Mr. Wright: Well, there are a number of qualifications. As to a road show exemption per se, we are opposed.

Judge Hand: Radio Center.

Mr. David Sher: May it please the Court, this is an application for leave to file a brief amicus submitted in behalf of (3956)

an independent theatre known as the Mosque Theatre, located in Newark. It is directed to a single proposition, and that is if auction bidding is to be instituted, it is suggested that such bidding will not be effective unless coupled with the proposal suggested by the Government in its decree to the effect that the five major defendants shall not be enabled to show each other's pictures. The brief points that out if that proposal is not included, these defendants will be able through their own production to have a competitive advantage in the auction bidding which will neutralize the entire value of that bidding. It is a short brief, your Honors, and we ask to leave it.

Judge Hand: Very well.

(3957)

Judge Hand: Independent Theatre Owner and Operator Members.

Mr. Blasi: Your Honors, with your permission I would like to present Mr. Herman Levy of the Federal Bar of Connecticut, who is counsel for the Independent Theatre

Owner and Operator Members of the Motion Picture Theatre Owners of America, and I ask your Honors to hear him.

Judge Hand: All right.

Mr. Levy: Thank you. My name is Herman M. Levy, of New Haven, Connecticut.

If the Court please, I think my task this morning has been made quite brief because so much has been said that I had planned on saying against auction bidding.

I would like to state that my organization represents 2700 or 3000 independent theatre owners who are represented by my firm, some of them interlocked with other organizations holding memberships in the A.T.A. and the Southern group in our organization.

We have been wondering whether the words used by the Court:

"The license desired shall in such case be granted to the highest responsible bidder having a theatre of a size and equipment adequate to show the picture upon the terms offered"—

whether those words used by the Court meant auction bidding. The term "auction bidding" was coined, or auction sell- (3958).

ing or auction bidding as a term was coined after the decision was announced. Who started it, we don't know. Certainly the words were not used in the decision.

Now did the Court intend by those words—and we ask this as amicus curiae—to start a restricted system of competition in the industry where a salesman would go from theatre to theatre comparable and adequate to get a bid of one theatre and refer that bid to the next theatre and to the next, and in that way get the highest competitive bid? It is hard to believe that that is what the Court intended. That is what existed in this industry some twenty-five years ago when a salesman would take a picture and go from house to house. If that is what is intended, that is what

we are afraid of this morning. And if the Court meant that plan as the only plan for doing business, then we state that that plan will bring about two disastrous results both of which the Sherman Act was intended to avoid. First it will mean increased film rentals. That is self-evident. Two houses buying pictures under the old system, house A was a favored house, it had been there a long time and got the pictures first-run. House B got the second-run in town. Now with auction bidding, with both houses able to bid at the same time, it is obvious that house A will pay more money to hold on to its run, and house B will bid to the point of (3959)

over-bidding to get a run it never had. That means reckless bidding. If film rentals go up, that increase will have to be passed on to the consumer. Certainly that was never the intention of the Sherman Act. And yet the conclusion that the consumer will pay more for admissions is inescapable because film prices will positively go up. The degree of increase nobody can today anticipate. And secondly, in our opinion, competition will become restrictive if the courts say—and that seems self-evident—that you may sell your product only on this basis and no other.

Now the Court asked an attorney in this room who spoke earlier, what alternative he had, and I subscribe to his alternative. The Government complained not that the distributors own and operate theatres but that in the operation of those theatres certain unlawful practices had been developed. Now we say to the Court, this Court has found those practices unlawful. Why may they not be enjoined from indulging in those practices and open the door to any kind of legitimate competition? Once the Court has found unlawful acts, then the Sherman Acts says the court must open the door to competition, not in any restricted sense, that this is the way and the only way you can do business, but any way, whether these exhibitors are independent or affiliates, might find, and if the means that they find are unlawful means, then it is for the Department of Justice

(3960)

to step in again. But until that time the court should open the door wide to competition in any legitimate way that they may find.

In the event the Court is not satisfied, and apparently from the decision I must conclude that the Court is not satisfied, with the alternative of merely enjoining unlawful practices and leaving the door open to any competition that these theatres may evolve with their customers, then I see the Court sees fit to set forth in its decision what shall be the tests in determining clearance, and it lists seven of those. It says the defendants may use these tests in determining what is clearance. Then I say to the Court with the exception of the elimination of one or two, why not amend the decision of the Court to read that in the sale of those pictures, the exhibitors use those tests. I am merely adding on a certain proposal that the exhibitors have added in their proposed decree that in addition to those tests there should be the test of financial stability, comparable customers, the customer's position and integrity in the community, and their past history with this distributor. But we submit that those suggestions of the distributors plus the one selected by the Court under the decree to be used for clearance, make an alternative plan and leave the door wide open for the

(3961)

bartering and negotiation that we are asking for this morning.

Now if these suggestions are good enough and legal enough for clearance, then they must be good enough and legal enough for competition in the buying of pictures, and we submit that those same things plus the few that I mentioned, could be incorporated in this decree and then open the door wide open to any legitimate competition that these defendants and theatre owners can evolve.

(3962)

Judge Goddard: May I ask, Mr. Levy, what about the stipulation of admission fees?

Mr. Levy: We are opposed to that, on the other hand. We are opposed and the Court has found that illegal.

Judge Goddard: That is your third relief, as I recall it, in consideration for clearance.

Mr. Levy: Yes. Those, of course, elements of the seven which have been found by the Court to be illegal we would not expect to be included. However, under the consent decree, the distributor granted a run and clearance based upon a very important element that your Honors have left completely out of this decision, and that is the amount of revenue that the distributor could get from a picture.

If I represent a house, or own a house, or operate one which can give to a distributor more revenue for his picture, on whatever the terms, I feel that I am entitled to that picture. Under the decision as it now stands, if I read it correctly, and if not I suppose someone will subsequently correct me, the amount of revenue derived by the producer is no factor in helping me to get a picture, even though mine is the biggest house.

I know it cannot be by admission prices in the contract, but it certainly could be, as it was in the consent decree, by the amount of revenue to be obtained, and that, if the Court (3963)

please, a distributor knows pretty well from his past history, what one house will do and what another house will do.

Contained in this brief, and I shall not go into it in detail as I would like your Honors to read it, are certain practices that we feel the door has been opened to, in the decision as it now stands, and we took those up with Mr. Wright and submitted to him our analysis of what evils could develop under the system which is proposed by the Court. He found some of those with merit and has included them in his proposed decree. And as a friend of the Court, if your Honors please, we ask your Honors to give your serious consideration to those proposals of Mr. Wright and ours for inclusion in the decree.

Under any system of competitive bidding, if your Honors please, a man could very easily overbuy, if money is the only factor, overbuy and backlog, and overbid and operate at a loss. That overbidding and operating at a loss is remote, I question. The federal court in Illinois, only recently, in the A. & P. case, found that that organization operated at a loss to get rid of competition, and without going into detail of overbidding, backlogging and overbuying and so forth, operating at a loss, we do submit and ask the Court to consider those points and to include them, if it meets with the Court's philosophy in the final decree.

(3964)

That brings us next to the subject of arbitration. My clients are keenly disappointed that the Government has asked for the liquidation of arbitration. It has been our position for years, for 15 years that I know, as an association to stand for and foster arbitration and conciliation rather than litigation. As your Honors pointed out in the decision, litigation is a very serious and expensive procedure. We ask that the Court give serious consideration to arbitration, despite the Government's objection, at least, as the Court stated, for those people who wish to arbitrate their matters; and I understand the Government's concern is that the distributors may or are planning to use arbitration as an escape for the penalties of violation of the decree. We say that that is not what this Court intended, and if it did open the door to that, then certainly the right of exhibitor A to arbitrate with Fox or Paramount should not be correlated with the Department of Justice's duty of enforcing the decree that is entered. The two are not mutually necessary, in my opinion.

We feel, finally, if the Court please, that the plan offered, whether it be the plan that has been accepted as the auction bidding, house to house bidding, picture by picture bidding, or any other form of restricted competition, if that is what this Court intended, I would just like briefly to show how

(3965)

such a plan opens the door to litigation in an industry that has been sorely tried by litigation since I can remember.

Judge Hand: Hasn't that been pretty well developed by these other speakers?

Mr. Levy: If your Honor feels it has, I am perfectly willing to withdraw that remark.

The Court: If you have any new thought, all right.

Mr. Levy: I am not sure that it is new. I thought it was more forceful, but I will withdraw my comment. I will then withdraw those comments and rest upon my predecessor's remarks, but I would like to say this: If this plan is a workable plan, if this is what the Court intended and it is a workable plan, why are both the proposed decree of the distributors and the proposed decree of the Government silent on the rules and regulations of auction bidding? Not a word, as I can see it, is in either proposed decree. Your Honors stated in your decision that the parties to this suit shall submit their findings to the Court for its assistance. The Court will have no assistance on auction bidding. And the reason I feel is because it corroborates the unworkableness of this plan. As soon as you start saying, "This is fine" on paper, "house B can now get first run by bidding \$25 more (3966)

than house A." It holds only with house A and house B, and you cannot get it to work with another town.

It is unworkable, in my opinion, and impossible to draw up a set of rules and regulations that can govern the system of auction bidding.

One final point, and that is that this organization last July started a poll of the independent theatre owners in the United States. It was not limited to our membership; anybody at all, whether he was for auction bidding or against auction bidding, belonged to an organization or not, was asked to answer four questions on controversial matters raised by the Court, auction bidding, arbitration and so forth, and we offer those without comment except to say that of almost over 250 answers received, the vast majority of them

were from small independent theatre owners, owning not more than five theatres, and most of them one and two, and of the 280 votes on auction bidding, 261 are opposed and 19 for. I won't go into the other answers. They are all tabulated and they are offered only for the purpose of argument.

And then I would like to say something which is not in the brief, and which has been brought up by the discussion here and which has been discussed thoroughly, the provision of road showing. As far as our independent exhibitors are concerned, we have no objection to road shows when; as and (3967)

if their pictures be road shown on a national policy, and not one city picked out, or one there and another there; but if the national policy is launched by the distributor, wherein the picture will be road shown all over the country, we feel they are entitled to that and have no objection to that.

I thank you very much for permission to argue this matter.

Judge Hand: Joseph P. Day. I do not see that you should be heard on an application merely to enlighten as to how you can auction. There is no reason you shouldn't file something, if you want to.

Mr. Kenney: If your Honors please, our only request is on the basis of having studied the thing and with the feeling that we may be able to be of some assistance, that we be permitted to file a brief. It was not our intention to ask for permission to argue.

Judge Hand: Conference of Independent Exhibitors. That seems to be another application.

Mr. Myers: It is an application, your Honor, for leave to file a brief as amicus curiae and to make a brief oral statement.

If your Honors please, I speak for the Conference of Independent Exhibitors Associations. With our humanitarian (3968)

instincts we have brought together 22 independent theatre associations covering 28 states, and the Territory of Alaska, so that they could all join in one brief and in one brief state-

ment to the Court, and, to that extent, expedite these hearings.

Strange voices and strange champions for the independent exhibitors seem to arise on these occasions, and to the extent that they advance arguments that coincide with our position, we welcome them, but we must, in order to keep the record straight, we must point out that included in this very short brief of ours and this very short statement are all, with possibly one exception, of the independent exhibitor associations of the United States in the sense that they are comprised wholly of independent exhibitors and are not a mixture of independents, affiliates, producer-owned theatres and the like.

I have regretted that there seemed to have been put forth to the Court here this morning an utterly negative attitude toward the Government's position and what it is seeking to do in this case. True, our independent exhibitor organizations are opposed to the competitive bidding system as outlined in the Court's decision. They do not think it is workable, they think it will work injustice, but that ground has been so thoroughly covered that I do not intend to impose on the Court by rehashing any part of it.

(3969)

We have gone a little beyond that and we look forward to the contingency, however remote, that such a system might come into operation in this industry, and, therefore, have ventured to suggest methods for making it as workable and as little burdensome upon the industry, and particularly upon our exhibitors, as possible.

In the first place, we do not think that it is possible for this system to promote competition in this business so long as the producer-distributors-exhibitors have this great backlog of their own product to exhibit in their own theatres. We do not think independent theatres, under those circumstances, could possibly compete successfully for the product against the affiliated theatres. So, we align ourselves with the Government in the suggestion that any competitive bidding system, in order to be effective, must be accompanied by an injunction against the cross-licensing by these defendants

—the Big Five I am talking about—of the playing of each other's pictures in their theatres.

It might very well be asked, "Haven't they a right to do that?", and I am not prepared to say that they haven't a right to play each other pictures in their theatres, abstractedly considered, but in Sherman Act cases many things are (3970)

enjoined in order to make effective the relief which the statute calls for, which may be entirely legal in and of themselves. The Sherman Law, as it has been well said, is a limitation of rights, rights which may be put to evil consequences. Therefore, I think it is an entirely appropriate thing, in order to make this bidding system effective and just, that it should be accompanied by an injunction against cross-licensing. And if the defendants say that is a harsh remedy, we must bear in mind that the opinion of this Court says that the bidding system is, in substance, an alternative to the very harsh remedy of complete divestiture; and if, as seems likely, the defendants prefer the competitive bidding system of divestiture, then I should think they should yield whatever is necessary to make that system workable.

It has been well said here this morning, and very eloquently said, that there cannot be a comparison of bids on a percentage basis. Frankly, I have been with the independent exhibitors for some 17 years and I have studied this from every angle, and I have conferred with them almost constantly since the Court's opinion, and I want you to know that we are sympathetic with this proceeding here and not taking a position of opposition to it; but we cannot see how bids, based on a percentage arrangement, can be compared (3971)

justly or fairly, or how any such attempt can avoid these very discriminations which were practiced before and which are the underlying basis of this proceeding.

So, instead of using that merely as an objection, we venture to suggest that if the defendants want competitive bidding, as an alternative to divestiture, there again they

should yield to the extent that all competitive bidding be on a flat rental basis and not a percentage basis.

Flat rental contracts, as your Honors know from the printed forms in the Government's brief, are payable on the barrelhead. So that not only allows of a complete comparison, but also it eliminates incidentally, some of the most evil incidents of percentage playing and some of the most irritating and irksome things in this business, and that is the checking of theatres, the espionage over the operations of the independent theatres, auditing their books and finding out all about their business, designating the days of the week on which pictures may be played; and, incidentally, it would also eliminate all the controversy, so far as those engagements are concerned, concerning the admission price to be charged, and as to the responsibility of the exhibitors and the size and suitability of his theatre for the pictures on the particular run.

Again, on the assumption that the competitive bidding (3972).

system might come into effect in this industry, we offer concrete suggestions for making it as workable as possible.

We do not think this business is going to be conducted to the chant of the tobacco auctioneer. We think, if there is going to be competitive bidding it will have to be done as we have known it all our lives, the system of sealed bids, the requirement that they be submitted within a definite time after the picture is offered, for the offering of those bids at a particular time and for inspection of bids by the disappointed bidders, and other concrete suggestions, all contained in the brief, your Honors, which I hope will be helpful in the consideration of the matter.

In conclusion, I would say that we do join in the other statements made here, the reasons advanced why the competitive bidding system as outlined by the Court would be unworkable and would work a hardship on the independent exhibitors. We don't like it, we don't want it, but if it is to come, we want it to be as workable and as little burdensome as possible.

Mr. Proskauer: Before we adjourn, would you permit me to inquire of Mr. Myers: Have you even taken a poll of your members as to whether they want to abolish percentage?

Mr. Myers: Yes, Judge Proskauer, I think that has been done in every territory affiliated with our association; and (3973)

if you are a student of the trade papers, as I know you must be, you probably read that there was an open forum of the independent exhibitors of the United States in Boston last month, and it was not at all confined to our members. With 600 independent exhibitors in the room that afternoon, they took a poll on the subject, and I rather imagine the press and Warner Bros. by this time has received a copy of the resolution they adopted on that very subject of percentage selling.

Mr. Proskauer: The recommendation is that that would be disastrous.

Judge Hand: Everybody has been heard who wants to on these motions? And has everybody filed briefs who wants to? On the motions of moving parties, I mean.

Mr. Kenney: If your Honor please, as I stated before, we had no desire to be heard on argument, but that we wanted to file a brief. May I ask a time limit on filing a brief as amicus curiae?

Judge Bright: Didn't your client submit a long letter on the subject, outlining his mechanics?

Mr. Kenney: The entire mechanics of the plan were not outlined in that letter. They have now been further elaborated together with certain forms which are to be devised, which are the heart of the plan itself.

Judge Hand: You may submit it by tomorrow. (3973a)

Mr. Kenney: I gather your Honor does not want it in printed form.

Judge Hand: I don't care whether you print it or not. We will adjourn until tomorrow morning at 10.30.

(Adjourned to Tuesday, October 22, 1946, at 10.30 o'clock a.m.)

(3974)

United States District Court**SOUTHERN DISTRICT OF NEW YORK****UNITED STATES OF AMERICA***Petitioner,**vs.***PARAMOUNT PICTURES, INC., et al.***Defendants.***Equity
No. 87-273.****New York, October 22, 1946,
10.30 o'clock a.m.****HEARING RESUMED.**

Mr. Wright: May it please the Court, the principal arguments that the plaintiff desires to make in connection with the judgment proposals and proposed findings that are now before the Court have already been submitted in written form.

Mr. Proskauer: We don't hear a word you are saying.

Mr. Wright: I say the principal arguments that we desire to make in connection with the proposed judgments and findings that the Court now has before it have already been made and submitted by us to the Court and to you and to the friends of the Court in written form.

We have no desire to enlarge upon those arguments or to reiterate them orally at this time as we assume we will be given an opportunity tomorrow to reply to such argument as the defendants may make today.

Therefore, our time today will be devoted to a discussion of the points raised by the non-parties who were heard
(3975)
yesterday.

In evaluating those points we think the Court should give some consideration to the position of those groups in the industry as disclosed in their various petitions and briefs.

You will note from their petition that Mr. Jackson's and Colonel Barton's group and their activities in this connection are being actively supported, financially and otherwise, by certain unnamed Paramount partners. Their position is perhaps closer than any of the others to that already assumed by the defendants in this suit. The associations respectively represented by Mr. Arnold and Mr. Williams have members who are defendants in this suit or affiliated with these defendants. But those members are not participating in this particular proceeding. The same is true of the Motion Picture Theatre Owners of America, represented by Mr. Levy, on whose behalf a brief has also been submitted, but the representation there is also confined to the independent members of that organization.

Now, as stated by Mr. Levy his memberships overlap that of the others just mentioned to some extent.

Thus these groups who are silent on or opposed to the basic relief, affirmative relief sought by us, are composed (3976)

of independent exhibitors who by their membership and cooperation with these organizations affiliated with the defendants are already—are now and always have been committed to the proposition that collaboration with the defendants is more profitable for them than maintenance of an adversary position of basic opposition to monopoly as proposed by this suit.

The Government's proposed judgment, in so far as it grants affirmative basic relief directed to that monopoly position, is fully supported by the only completely independent groups who have appeared here, that is, the briefs submitted by Radio Center, Inc. and the Conference of Independent Exhibitor Associations.

The two briefs submitted on behalf of independent producers are confined to independent producers who market their films through the distributor-defendants. They are independent in the sense that they finance their own productions, but it seems clear from the allegations of their peti-

tions and briefs that they have no independence whatsoever when it comes to securing an outlet for their films.

All of them insist that it is economically impossible for them to release their pictures through any other distributor than a defendant. All of the exhibitor briefs insist that independent exhibitors cannot operate without the films distributed by these defendants. (3977)

In fact, most of what is said in the briefs of all those groups is based upon the proposition that the defendants today collectively enjoy an effective monopoly over the distribution of films in this country.

As to this point, there is no possible ground for disagreement between them and the Government. However, there is a sharp divergence between some of their views and ours as to what the Court should do in such a situation. As we understand the Sherman Act, the Court has no choice, when confronted with a monopoly of this character, but to adopt effective measures to destroy that monopoly.

Neither the Justice Department nor the courts are authorized to establish a policy of monopoly for the industry with which they deal. Congress alone may decide that a given monopoly should be subjected to some form of regulation or given an exemption rather than dissolution. Congress alone has the power to create the necessary administrative machinery for such regulation. (3978)

The briefs of the independent producers advocate affirmative relief which is only consistent with the continued retention of the existing monopoly of distribution that the defendants now have, and for that reason alone ought to be rejected. If certain advantages which the holders of that monopoly now enjoy prevent the independents from competing with them, the proper remedy is to remove those advantages rather than to compensate the independent elements with a special immunity from antitrust law requirements.

Now, while it may be true that the price-fixing prohibitions of the decree strike harder at independent producers, than they do at the major defendants, by virtue of the latter's complete power to fix prices in their own theatres, it is hardly an admissible solution to permit illegal price-fixing on behalf of the independent producers who release through these defendants.

Of course, in so far as these independents may release their film through non-defendant-distributors, they are not subject to any of this decree's restrictions. The kind of exemption they seek, while granted to benefit independent producers, would in effect take United Artists completely out from under the decree, as they release only independently produced film. They are a distribution agency only. The (3979)

same is true not only of price-fixing privileges, but all of the exemptions from the decree which these independents ask this Court to grant them; as well.

The road showing of pictures, for examples, presents the problem of admission price-fixing and clearance restriction in acute form. A road show is, by definition, an exhibition at extraordinarily high admission prices supported by an extraordinarily long clearance, to wit, as much as twelve months before the picture becomes available for general release. That kind of film exploitation hardly seems consistent with the objectives of the Sherman Act. However advantageous it may be to a producer in recovering his investment, such a benefit cannot possibly remove such price-fixing from the condemnation of the Act.

With reference to the road show exemptions suggested in the Vanguard petition, as I have already pointed out, we are opposed to any road show exemption. However, if there is to be any exemption of that kind, it should, in our view, be limited to films released through non-theatre-owning defendants, as suggested in the second alternative of the Vanguard petition.

Now, as far as the particular picture "Duel in the Sun," which apparently gave rise to that petition, is concerned, we

believe that the provisions of the decree probably ought not (3980)

to be made to apply to that picture, but the kind of exemption for this purpose proposed in the third alternative stated in the Vanguard petition is one which would exempt not only that picture, but a substantial number of unreleased pictures now in the hands of the major defendants, by virtue of a very substantial back-log that all of them had built up at the time this decision was rendered. That alternative is therefore objectionable in that form.

Now, we have been informed by counsel for United Artists, which is to release the picture, that it proposes to appeal from the price-fixing provisions of the judgment in any event, and we assume that a stay of such provisions during such appeal would probably take care of whatever special hardship might be presented by that picture.

Now, the various briefs filed on behalf of the exhibitor non-parties simply reveal what might have been supposed, even in the absence of such briefs, that some exhibitors support the Government more wholeheartedly than others in this proceeding, and the degree of support in general reflecting the degree of absence of affiliation or association with the defendants. We recognize, of course, that all of them are unanimous in opposing so-called auction selling, except the independent theatre operator in Newark, who owns the largest theatre there and who favors auction selling (3981)

plus a ban on cross-licensing as the best solution, short of divorcement, for his particular situation.

The phrase "auction selling", which has been rather freely used by all of the parties who appeared here yesterday to describe the method of licensing proposed in the decree suggested by the Court, is not one which appears in the opinion. Nor does it appear in the decree we proposed. We have not understood the Court's opinion as advocating the institution of an administered system of actual auction sales of motion pictures. We read it merely as advocating a com-

petitive disposition of runs by which two or more competing exhibitors might seek to exclude each other in providing that in order to prevent discrimination in awarding such runs, that the high bid, or high offer, in financial terms, should prevail.

Now, in order that our position as to the competitive disposition of exclusive runs and auction selling provisions, if you prefer, be made perfectly clear, we again point out that in our view without the prohibition against cross-licensing included in paragraph 8 of Section 3 of our decree, a so-called auction selling provision would be more harmful than beneficial to the enforcement of the Sherman Act against these defendants.

Therefore it seems to us that the choice now before the (3982)

Court, assuming that divorcement is unacceptable, is between the restricted system of competitive disposition of exclusive runs, including the ban on cross-licensing offered by the Government, or no so-called auction selling or competitive bidding system at all, unless the Court is prepared to adopt a system of selling films which only the major defendants desire.

Judge Hand: I did not understand what you were talking about in that last statement. In fact, I could not hear it clearly.

Mr. Wright: I am sorry, I will repeat it:

I say, it seems to us that the choice that is now before the Court, assuming that divorcement is unacceptable to the Court, lies between the system of competitive disposition of runs plus a ban on cross-licensing among the major defendant theatres, which we offered in our decree, or no auction selling or competitive licensing of runs system unless the Court is prepared to adopt a system of selling films in this suit which only the major defendants in the suit desire to have put into operation.

Now, we believe that—

Judge Goddard: That is not clear to me.

Judge Bright: You mean that the defendants would like to have it according to their proposed findings?

(3983)

Mr. Wright: I say what the Court has before it are two proposals which would give effect to the so-called auction selling or competitive bidding principle: 1, advanced by the defendants, which is objectionable not only to the Government but to the minor defendants, and to all of the exhibitor parties who have appeared here.

Judge Bright: Can you tell us briefly what that includes?

Mr. Wright: The defendants' proposal?

Judge Bright: Yes.

Mr. Wright: They have a rather elaborate system outlined for auctioning pictures with a statement of considerations which, as we view it, would be to permit them to continue to select virtually any customer that they wish to select in any particular situation.

(3984)

Mr. Wright: Now, what we proposed was a system of resolving the contest between independents——

Judge Hand: Do you really think that what they are proposing goes entirely outside of our decision, do you, in regard to this——

Mr. Wright: Yes, I do.

Judge Hand: They won't be permitted to do that if it is no.

Mr. Wright: I submit further that it not only goes outside the decision but it is not a system which any of the people who are supposed to be benefited by it have said will benefit them.

Now we believe that our paragraph 10, Section 2, taken as a whole, that is, the section in which 10(a) provides for some run at reasonable terms, 10(b) provides for competitive distribution of exclusive runs, Section (c) and (d) are in the language of the opinion providing that the licensing be without discrimination, theatre by theatre, picture by picture, and (e) is a provision providing that pictures must be

in our view that kind of general prohibition as to methods of licensing cannot break up affirmatively and effectively a combination such as has been found here. We think the Supreme Court has plainly indicated that mere injunctive relief of that character is not sufficient to deal with situations of this kind.

Mr. Proskauer: May it please your Honors, we had anticipated that the course of procedure here today would be to have some general comment expressing the view of the defendants, and that then we would take up the respective decrees that had been submitted, if your Honors desired it, section by section, and endeavor to arrive at the decree which your Honors feel you should enter in this case. We did not conceive that we came here to retry the case. I shall have a word or two more to say about that as I proceed.

At the outset I wish to indicate a wide divergence in viewpoint between the Government and ourselves as we approach this problem.

(4001)

The Government's memorandum in favor of its proposed decree begins in submitting a formal judgment which differs from that outlined in the opinion. That is of the essence of what we are talking about. The Government's proposal has no resemblance to the decree outlined in the opinion, and they frankly admit it. It is true that they say that they expect the Court will consider proposals which are supported by the findings, even though they do not accede with the relief outlined, and to that extent we would concede frankly that they are entitled to be heard.

But let us just, in order that I may fix the starting point for this consideration, take up one or two things that the Government has inserted in its decree:

"Clearance in favor of theatres owned by the defendants completely enjoined."

That is in their Section 11, Paragraph 5. Now let me say I am not going to elaborate on these things now. If it meets with your Honors' view, we will take those up in detail when

we come to consider the decree itself as submitted by us and by them.

In your opinion you suggested certain standards by which the reasonableness of clearance was to be determined. Those are discarded by the Government. All reference to arbitra- (4002)

tion is omitted; and, finally, out of the air, the Government pulls an injunction as to which, of course, I shall have more to say, absolutely restraining any one of us from showing anybody else his picture in his own theatre. Nothing of that sort was decided by this Court, and I shall call your attention to phrases in your opinion which utterly negative any such suggestion of finding or the reasonableness of any such relief.

Now, when the Government comes to criticizing our form of judgment, they say that we "have submitted a rather complex device conferring upon these defendants privileges and immunities which they do not now possess. If forced to choose between the decree proposed by the major defendants and a decree of dismissal, we should cast our vote for dismissal." I suggest that this particular form of in terrorem argument is hardly appropriate in this case.

(4003)

There is nothing we have suggested in this decree that is not grounded in the Court's opinion, and there is nothing that he can specify under that charge which gives it the slightest vitality.

For example, he says here today to your Honor that we had outlined details of a system of competitive bidding where the opinion did not make any such suggestions. But I call your Honor's attention to the words of the opinion:

"The administrative details in such changes will require further consideration."

And we in pursuance of that deemed it to be our duty to formulate and suggest to the Court and to our adversary the details which the Court called for for further considera-

tion that would make this competitive bidding system that was evidently firmly grounded in the Court's mind workable and efficient—at least as workable and as efficient as we knew how to make it.

We are a little resentful, if I may say frankly, your Honors, of the suggestion not perhaps we were lacking in good faith enough to attempt to mislead this Court, but that we were stupid enough to believe that we could do it; and we could do nothing better to give evidence of the intense earnestness with which we seek to implement what your Honors have decided than the preparation of this document (4004)

which brings into the sharpest relief the agreements and the differences between the Government and ourselves.

Now I have said that we are not here to appeal from your Honors' decision. Surely this competitive bidding system your Honors must know is not palatable to us defendants. It calls on us to do a difficult and very arduous and very perilous, from the business standpoint, task. Your Honors wrote that that is what there should be and we are not here to ask you to reverse your opinion. If you should decide that you want to modify that we are perfectly willing to consider with your Honors and give you the benefit of such aid as counsel should give the Court of even further alternative suggestions. But that leads me directly to the issue which Mr. Wright tenders us in absolute repudiation of what your Honors have written.

The suggestion is made here that Colonel Barton's client includes some Paramount partners.

Well, your Honors, all these associations are made up of all kinds of people. Two things are evident from what occurred here yesterday—that you cannot put these people into watertight compartments, and that there is also a great area of good will which the Government ignores between the 15,000 absolutely independent theatres in America, which (4005)

have grown up and are coining money today, between those

15,000 people and these five major defendants from whom they draw most of their pictures. And the time has come, I agree with Mr. Wright, to cut the heart of this thing and see whether Mr. Wright by his blind intransigence can persuade your Honors to destroy this industry.

He constantly talks about monopoly. Let's see what your Honors decided.

In the vast area of production the complaint is dismissed. There is no suggestion of monopoly or restraint.

Now when we come to exhibition and distribution this is what your Honors wrote:

"The five major defendants cannot be treated collectively so as to establish claims of general monopolization in exhibition."

Emphasize the next words; we have relied on them:

"They can only be restrained from the unlawful practices in fixing minimum prices, obtaining unreasonable clearances, block booking and the other things we have criticized."

I relate those words to Judge Bright's question as to the validity of the suggestion that Colonel Barton and Mr. Levy made here yesterday that the injunctive provisions de hora the competitive selling plan gives the relief which cures the (4006)

evils which have been found here.

It is still an object all sublime to make the punishment fit the crime.

What have we been found guilty of? And if I omit anything I hope somebody will correct me.

Price fixing.

Mr. Davis: Admission price fixing.

Mr. Proskauer: Admission price fixing, I mean; not the prices of pictures. You have enjoined us from that. That cures that.

played within thirty days of availability, that the license shall so specify.

Judge Bright: Section 10 of what?

Mr. Wright: Paragraph 10 of our Section 2.

Judge Goddard: Of the decree?

Mr. Wright: Our proposed judgment.

Mr. Davis: Page 6 of the folder.

(3985)

Judge Goddard: Mr. Wright, will you restate the two alternatives you suggested. I didn't get them clearly.

Mr. Wright: The alternatives with respect to auction selling that are now before the Court, as I say, are these: Our paragraph 10 of section 2 that you have before you plus the ban on cross-licensing embodied in paragraph 8 of section 3, or the major defendants' proposals as to cross-licensing which are embodied in their proposed judgment.

Now as I said, we believe that our Paragraph 10 in Section 2, taken as a whole, does constitute a workable set of standards for licensing films on a non-discriminatory basis, but that such a set of standards is obviously inadequate by itself to meet the problems posed by this suit.

Now any attempt to grant relief simply by superimposing a licensing system upon an industrial structure which remains essentially monopolistic by virtue of the control of distribution and exhibition facilities in a relatively few hands, cannot satisfy the Sherman Act.

Judge Hand: Now you call a thing monopolistic essentially because you can add together a number of people's interests and by treating it as one make it monopolistic. If their conduct is the conduct of united action, that, is one
(3986)

thing. That we have attempted to interfere with and break up. You are just going back to the old proposition which would really mean that there was a monopoly of production, that the Sherman Act was violated by everything they did. It would mean the revival of issues, I should think, that you have apparently abandoned.

Mr. Wright: Not at all, your Honor. What I have said concerning a monopoly of distribution is in no way inconsistent with our disclaimer that there was an actual monopoly of production facilities.

Now we of course disagree strenuously with the Court's view, as we pointed out in our comments on their proposed findings, that the conduct of the defendants in this case was such that you could not aggregate them for purposes of estimating their control over this industry.

(3987)

We think, in view of the Court's findings of a conspiracy among them, not only to fix prices but clearances and runs as well, you are compelled to aggregate them in any estimate that you attempt to make of their power in determining whether or not that power rises to monopoly proportions or proportions which require you to enter a decree which strikes at the power itself rather than merely to deal with certain aspects of its exercise.

Judge Hand: I do not see why you haven't the same proposition as to production exactly.

Mr. Wright: You do not have the same concentration of facilities in the hands of the defendants. You have independent people producing it.

Judge Hand: I do not see why not. I should think you would have great concentration, perhaps not proper percentage, but you can say that as to distribution, you can say that as to anything, any of the things they do. If you consider the fact that most of their pictures, of the best pictures, are theirs, which you are always saying, and if you add them together and treat them as a unit, there is a monopoly in production, I do not see any reason why you should not go after them along all lines and stop everything they do, sell out all their pictures, sell out all their theatres, sell out everything.

(3988)

Mr. Wright: As I understand the Court's ruling, the thing which would prevent us from aggregating their pro-

duction facilities for purposes of finding a monopoly is that the Court did not find that they conspired with one another in conducting their production activities. What the Court found was a concert of action among them with respect to their distribution activities.

The Court: Of course, you said they did not conspire with regard to production, that they had competition, and that you did not make any such contention.

Mr. Wright: I am assuming that for the purpose of this argument.

Judge Hand: As a result of your investigation into the matter.

Mr. Wright: I say that assumption is implicit in the argument I am making today. I am insisting that the critical point at which the supply is controlled is at the distribution level. At that point, it seems to me, perfectly clear not only from the evidence in the record but the positions taken by everyone else who has been heard here, that these defendants have actually complete control of the product.

The Court rejected our proposed solution of that problem by way of divorcement relief. We do not propose to argue that matter here. We do insist, however, that this Court (3989)

must, in any event, make a basic attack on this problem by any injunctive relief which may be decreed. Such a basic attack is, we believe, embodied in our proposed ban on the use of the major defendants' theatres as outlets for each other's pictures.

This provision is, in our view, the only provision short of divorcement which gives any hope of supplying the industry with the additional independent distribution and exhibition outlets that are essential to break the existing distribution and exhibition monopoly.

Judge Bright: If that relief were granted, wouldn't that exclude the major operators from exhibition during large portions of the season?

Mr. Wright: I don't understand what you mean by that, no.

Judge Bright: If they were only permitted to exhibit their own product in their own theatres.

Mr. Wright: That is not what the proposal calls for.

Judge Bright: I thought you said you would prevent them from exhibiting the other defendants' product in their own theatres.

Mr. Wright: The production of the other major defendants. They would always be free to exhibit their own (3990)

product plus the product of the minor defendants plus the product of non-defendant distributors.

Judge Bright: Could they get enough product to continue operation?

Mr. Wright: I think the record shows quite clearly that they could. After all, you have testimony in here as to these independent exhibitors who were existing with only one, two and three of the defendants' product in this suit and, in many cases, with none of the product that is controlled by the five major defendants.

There certainly is nothing in this record which would support any claim that a theatre could not be operated with only the product of one major defendant plus the three minor defendants plus independent distributors. In normal distribution of the product, in a competitive situation, where you have these eight major companies, one would play four of the defendants' product and another one would play the other four. That is a characteristic, normal pattern.

Judge Bright: I was just wondering whether you were not seeking indirectly to divest them of their theatres.

Mr. Wright: Well, it might be that in certain situations they might prefer to give up a theatre rather than to accept that restriction. If so, I see no reason why that makes the relief any less acceptable. The choice is theirs. (3991)

Judge Goddard: What is the fact, how many pictures does a defendant, average defendant make?

Mr. Wright: I think the figures in the record for the 1943-44 season show that the major defendants were making about 30 apiece.

Judge Goddard: That would not provide, would it, for the year's play?

Mr. Wright: No, except in a limited number of first run situations, where it would, yes. It all depends on the character of the operation, as chosen. Of course, there is no freeze on the number of pictures that any defendant chooses to make in any event. That is not a fixed matter. That may vary very widely, as in the past, from 20 to 60 pictures or more.

Judge Hand: To what extent do you attack first run discrimination only? I do not exactly know; I suppose you would say you never were attacking it, although the statistics were based on it.

Mr. Wright: It is the focal point of the attack because the first run distribution is again in exhibition, the critical area where control over the entire exhibition and distribution pattern in particular areas is exercised. It is through (3992)

the first run theatres, through the first run theatre operation and, of course, ownership of these defendants is largely concentrated in first run theatres in metropolitan areas.

Judge Hand: You have not asked anywhere only to prohibit them from exhibiting on first runs?

Mr. Wright: We do not so limit our ban on cross-licensing.

Judge Hand: You mean in your proposed decree?

Mr. Wright: In our proposed decree. Its effect would largely be confined to that except in metropolitan situations, the larger cities, where the defendants, as well as controlling first run, have a substantial number of second, third and fourth run theatres, but its principal impact would be upon the first run situations.

All of the independents who have been heard here have assumed in their arguments that this monopoly of distribu-

tion would continue under the decree proposed by the major defendants, and we think they are right in that assumption. We think it is plain that the monopoly will continue unless those major defendants are prohibited from mutual use of each other's theatres for exhibition of each other's pictures, and thus compelled to seek new exhibition outlets.

(3993)

Judge Hand: You mean, on any run?

Mr. Wright: That is our proposal, yes.

Judge Hand: On any run? I thought you just said it was not your proposal.

Mr. Wright: I said our proposal is not, in terms, restricted to first run exhibition. I said its practical effect would be largely for that in first run situations because those were the situations in which the defendant theatre ownership is concentrated.

As I say, we think it is plain that the prohibition of their mutual use of each other's theatres for outlets of each other's pictures is the only way, short of divorcement, that you can compel them to seek new exhibition outlets and to open their theatres to new distributors.

There is no assurance, of course, that any relief short of divorcement will terminate that monopoly, and we think that fact is implicit in all the argument that your Honors heard yesterday. We are not pressing the divorcement argument at this time only because we assume that we are all here to seek the best solution available within the terms of the Court's expressed desire to enter a decree which does not grant a divestiture on the scale necessary to effectuate divorcement.

(3994)

Judge Hand: As things are, not perhaps as they would be under a changed decree, what would there be left for, well, we will say for Paramount, the first one named here, if it was confined to its own theatres? Of course, you have stated, in general, what would be left. I mean, in particular, what would you statistics show would be left that would

please the public, let alone minister to their advantage, in the various localities? Of course, if they got some perfect star picture, they might run it in one big place the whole year. You must be prepared, I think, to make some kind of estimate and not just rely on the fact that these people are doing wrong, they must be destroyed.

Mr. Wright: The record clearly shows, your Honor, that that kind of prohibition would not destroy them. It would not compel them to dispose of any theatre except in perhaps a very few situations, in which they might require the product of more than four of these defendants. There is a great deal of flexibility involved there because they may step up, they may well step up their own production and distribution in order to take care of those needs. This proposal of ours gives them complete flexibility in that regard. (3995)

Mr. Wright: I can say this, your Honor, that as to first-run situations, the record is perfectly clear that there is no first-run situation that I know of that can't, or that it appears in this record you could not survive with the product of four major defendants. You can just consider what is the situation where there are two first-run exhibitors. Obviously they can't both play all of the products first-run.

Judge Hand: Of course if Paramount had the only theatre in a place and that was all that was necessary to supply the demand, it would really prevent that place from having any of the shows, the good shows, of Warner, Loew's—any of these people.

Mr. Wright: It would not prevent that place from having those pictures very long. There would be another theatre there in very short order. In the places which are now closed towns in the hands of these affiliated defendants, theatres would be opened very promptly.

Judge Hand: I shouldn't wonder if that was true in some of them. On my hypothesis, though, it would not do anything. I said one theatre was enough for the town. If one theatre was enough to furnish all the accommodation

except good shows—I mean by “good”, variety of shows chosen from these defendants—why, I am by no means clear that the mere inability to see some shows would build up (3996)

another business if there wasn't the material for it in the population to make it pay.

Mr. Wright: What your Honor is talking about is a situation that simply is not found in this record. These defendants do not operate theatres in one-theatre towns. In almost—

Judge Hand: Oh, I admit that.

Mr. Wright: In almost all of the towns where they are, they are sufficiently large to support multiple theatres. That situation that your Honor poses is wholly academic insofar as this record is concerned.

Now in any event, a situation consistent with the Sherman Act cannot, we believe, be secured in this industry merely by imposing on the independent buyers competition among themselves for a monopoly control of product. Prohibition of course licensing among the major defendants would tend to create a free supply of film product.

Now we note that counsel for some of the defendants expressed disappointment over the abandonment of arbitration in our proposal. That was Mr. Levy, I believe. But at the same time he seemed to agree with us that arbitration should not be a decree-enforcing device. Of course if these defendants and any exhibitors with whom they deal may in (3997)

individually decide to arbitrate their grievances, they are free to do so.

In the absence of coercion attributes resulting from a collective application of such a system, there is nothing in arbitration, per se, which is necessarily inconsistent with the Sherman Act. However, all of this being so, there is clearly no occasion to incorporate in this decree any provisions of that character. The purpose of the decree that is entered

here must be to enforce the public policy of the Sherman Act, as such, rather than to implement mere private rights of persons affected by it.

If, as these independents say, and as the distributors now urge, arbitration is not intended to substitute in any way for the normal devices which would customarily be employed to enforce a decree of this character, then certainly there is no reason for this Court to deal with this matter in any way in its present decree other than to terminate the existing arbitration system.

One word of caution should perhaps be noted with respect to any attempt to create a workable judgment by selecting some provisions offered by the Government and others offered by the defendants. The decree offered by us has interdependent provisions which are necessary to make it work. For example, dissolution of joint theatre holdings among the defendants themselves, if uncontrolled judicially, might (3998)

seriously weaken the efficacy of the relief granted against cross-licensing. The unqualified ban on theatre expansion and the insistence that the defendants completely eliminate themselves from the present situation where their interests are jointly held with independents, is also a necessary complement of the ban on cross-licensing. It is apparent from the defendants' proposed judgment, which offers no plan for actually disposing of any theatre interests, but provides that they may either buy out or sell to the independent interest, or retain the status quo, that they contemplate a stalemate in most of the situations where they are now in partnership with independents. This Court, of course has no power to compel any independent to sell his interest or buy a defendant's interest, and all the defendants would have to do in those situations where the independent declined to sell or buy at a price agreeable to them, under their proposal, would be to sit back and inform the Court that no dissolution was possible at the end of whatever period is set for their completion.

Now, we are here primarily to expedite the entry of this judgment, whatever it may be, and unless the Court wishes to question me further now, I think the best thing to do now is to sit down.

(3999)

Judge Bright: I have one question to ask you, Mr. Wright. It was proposed here yesterday that this competitive bidding system be eliminated entirely, and that the other injunctive provisions of the decree would take care of whatever evil may now exist in the industry. What do you think of that?

Mr. Wright: We think the other injunctive provisions are plainly inadequate to take care of evils found by the Court, and we think the Court's opinion quite clearly reflected that point of view when it suggested competitive bidding as an alternative to divorcement, at least to be tried until found wanting.

Judge Bright: Well, do you care to specify in which respects it is inadequate, the other injunctive provisions?

Mr. Wright: Well, in general all that those provisions do—now I am referring to the other injunctive provisions advocated by the defendants—

Judge Bright: Indicated by the opinion.

Mr. Wright: Well, the opinion did not, as I understand it, set limits on the injunctive relief which might be granted. As I understood the opinion, the only relief which was flatly rejected at this time was divorcement, and I suppose we are really here to decide what form of injunctive provisions should go into effect.

(4000)

Now we have proposed this affirmative injunctive provision prohibiting joint use of defendants' theatre outlets by each other. So that we say is a provision which does attack this unlawful power at its base, and would be, in our view, an effective provision.

Now all of the other provisions merely relate to the form of licensing procedure that is to be used in the future, and

Unlawful clearances. You have not only enjoined us from that; you have prescribed the methods by which reasonable clearance are to be determined.

Those and master agreements. You have enjoined us from that.

Block booking. You have enjoined us from that.

You said nothing about runs, but if the time comes when your Honors want to consider any alternative to this competitive bidding plan I think my colleague, Mr. Whitney Seymour, has a suggestion to make that would cure any possible suggestion of evil as to the creation of runs.

But the point of what I am saying is: We challenge the right of the Government to come in here and talk about destroying this monopoly, which to them means just the destruction of a great business, as though we had been

(4007)
found guilty, really, of an octopus-like monopoly which was strangling business and trade and called for such radical uprooting as a court would feel it could give despite the misery caused because of the seriousness of the offenses and their widespread nature. We have been found guilty of doing just those four things. You have enjoined us from doing that.

He suggests that those arbitration provisions—and he actually charges us with that in his brief—that we put in these arbitration provisions to escape the consequences of violation of your Honor's decree.

I don't believe that counsel for the Government of the United States should say a thing like that when there isn't a word in our proposed decree that makes arbitration a substitute for either contempt or treble damage suits, or anything else.

Mr. Wright: Why is it in the decree, Judge?

Mr. Proskauer: I will tell you why it is in the decree, but first I would like you to be man enough to say that what I have said is true.

I hear no answer.

That question that counsel puts to me—

Judge Hand: I don't see from what I know about the case and from the argument of either of you that this arrangement of arbitration affects the Government at all. Of course (4008)

they can accept it or reject it. They have said, and we really put it in because all sides said, that it had worked so splendidly and that it had been a great advantage to have that tribunal. It does not get rid of the proponents of the decree. It does not get rid of treble damage suits; it was never intended to.

Mr. Proskauer: Your Honors, we accept everything you said. My heat was occasioned because of the charge of working subterfuge on this Court.

Judge Hand: I know, but there is no answer in the world to what I have said. Of course they don't have to stipulate anything if they don't want to, and nobody does. We made that plain in our opinion. We thought you all regarded it as an advantage to dispose of things without multiple litigation.

Judge Proskauer: That is the spirit in which we considered it, your Honor, exactly that.

Judge Goddard: Judge Proskauer, you don't take the position that if the parties to a controversy resort to arbitration that that grants immunity, do you?

Mr. Proskauer: Certainly not. We repudiate that completely.

Judge Goddard: I thought that from what you said.

Mr. Proskauer: What we resent is that we are charged with having taken that position.

(4009)

Now that leads me to the end of what I want to say.

Your Honors have said in this opinion "That it does not follow that we should break up the exhibition business, root and branch. Such total divestiture would be injurious," and I don't read on. But the Government seeks divestiture despite all the showing that was made on this trial and the

showing that has been made to your Honors and the decision that has been made by your Honors, and they come in with a provision founded in nothing in the opinion which enjoins us from licensing pictures to one another for ten years, and if there was ever one thing that everybody connected with this industry who would be candid and honest would agree on, it would be that such a provision amounts to complete divestiture.

I am answering the question that Judge Bright put to Mr. Wright.

My people estimate that if we in our theatres, Warner Bros. in their theatres, could not buy any pictures of any one of the other majors that we would be closed 65—is that the figure?

A Voice: Yes.

Mr. Proskauer: —approximately 65 per cent of the time.

This record is replete with testimony, in the inter-
(4010)

rogatories and from these various documents, of the number of pictures produced, the number that are required to run a firstclass theatre in the city, and this proposal which Mr. Wright and Judge Thurman Arnold take out of thin air amounts to this: You can keep your theatres, but you can starve with them. We won't let you have the same right which anybody else has to go and buy pictures from Paramount or Fox or RKO.

Why not? We have not been found to be guilty of any monopolization with them. And if the considerations which move your Honors to deny Mr. Wright's claim of divorce-ment are sound, as we believe they are, those same considerations must move you to strike down or where it has been asked for for the first time in this case this particular injunctive relief, which is a slow death—even worse than the immediate decapitation with which he threatened us. It is impossible, your Honors, for any one of these defendants to continue theatre ownership successfully under any such decree and there isn't the slightest occasion for it.

(4011)

Judge Hand: These people yesterday said that this system, this competitive bidding system, would leave them worse off than they are now because the major defendants would always be able to outbid—I infer that is their argument—and always get the pictures. Have you any comment to make on that argument?

The other objections they made may be more or less serious. They are just as serious to you as they are to them, and just as serious to everybody else as they are to them, that is, the technical administrative objections that they urged. I considered that they might be troublesome. I do not imagine that they are insuperable.

What does the trade, so far as your knowledge goes, outside of these protests that we heard in argument yesterday by a limited number of associations, think of some system of competitive bidding? We never said it should be put on an auction block anyway.

Mr. Proskauer: No, of course not. I have never referred to it as auction block.

Judge Hand: Yes.

Mr. Proskauer: I have to answer your question less directly than I am accustomed to answering questions from the bench. We do not like this system that your Honors proposed. We think it is going to impose very great burdens on us. I am not here to defend or to attack it but—

(4012)

Judge Hand: Let me interrupt you at this point: It is hard to have any other system without what amounts to conditional licensing.

Mr. Proskauer: I was going to come directly to your Honor's question. I do not think there is any force, personally, in the objections to it that you mentioned in your question, because, for a defendant in this case to overbid for the purpose of crushing out a competitor, being the kind of thing that A. & P. was found guilty of in that suit, is clearly a violation of the law, and I suppose a clause could be formu-

lated which would enjoin us from doing the thing that we would never dream of doing. I think that that particular criticism on it is one that can be readily met. The other difficulties, as I told you, are very great and that is why, when we left court here yesterday, we all sat in a huddle, almost all afternoon, trying to formulate some suggestion that might be made to your Honors, if you asked us for it, to tighten this thing up if you drop this competitive bidding system.

We are not asking you to drop it but if you do drop it, we believe, as I have suggested, that if you read your own opinion and find out just what it is you are trying to stop, you will find you have stopped it dehors if perhaps you (4013)

would add complete protection on the subject of runs as well as of clearance, and this whole job is done, you have an industry then that is functioning.

But answering your question directly, I think you can enjoin us from unreasonable overbidding.

Judge Goddard: Judge Proskauer, you said that if the Court asked for it you had some suggestions to make with respect to auction bidding?

Mr. Proskauer: No.

Judge Goddard: You did not?

Mr. Proskauer; Not, not with respect—

Judge Goddard: Or some alternative.

Mr. Proskauer: No, it was simply a tightening up, a tightening up of the provisions which enabled me answer Judge Bright's question in the affirmative, that the injunctive provisions of this decree gave all the relief which the Court's opinion called for, and when we come to that, I am going to ask Mr. Seymour to take it over because he has been the father of it.

Mr. Arnold: I simply rise to correct the record. I think it is important that it be clear what my client's position is. Judge Proskauer inadvertently, and no doubt because he

connects me with schemes which he considers uneconomic, says that we supported Judge Thurman Arnold and Mr. (4014)

Wright supported the Government's section on the limited cross-licensing. I want to make it clear that I said yesterday, and I say again today, that the Association which I represent is split on every subject except one and that is competitive bidding will never work under the proposal made by the Court, nor should we be compelled to come in and competitively bid against each other under the proposal made by the Government. That is our position, and I want it perfectly clear.

(4015)

Mr. Proskauer: I am very glad to have the correction and to proclaim that for once on this occasion Judge Arnold has put himself into a good economic situation.

Mr. Arnold: I put myself into an economic situation where my clients differ.

Mr. Davis: I want to say that having gone through this trial and sat on this side of the table, my sympathy goes out to Mr. Arnold in the fact that his clients are split. It is a phenomena which throughout this case has not been at all unusual.

I only want to say one or two things in concurrence with what Judge Proskauer has said. I think practically all of us on this side of the table regard competitive bidding as an experiment, doubtful in outcome and difficult in administration, but we are all quite willing to accept the judgment of the Court in that particular and do our best to implement it. I think I would be somewhat lacking in candor if I did not say that the attack made upon it yesterday had somewhat shaken my own confidence in the final outcome. But we are not here—and I repeat this—we are not here to retry this case. We are not here appealing for a modification of the Court's opinion, and I beg the Court to believe that in the draft decree which we have submitted we have made an earnest and as intelligent an effort as we are

(4016)

capable of to implement the Court's opinion and put it down in writing.

My brother Wright does not accept that either as to motive or as to result; and as I sat here this morning studying his aspect from the rear, it occurred to me that the only trouble with my brother Wright is that he is out of his century. He belongs back in the time of Cato the Censor, when every speech which he delivered in the Roman Senate closed with the words "Carthago delenda est"; and every remark my brother Wright makes in this case closes with the remark there must be divorcement. He begins with a major premise which finds no support in the record—there is a monopoly—and not varying at all from that major premise, he reaches the inevitable conclusion there must be divorcement. And I respectfully submit, however that may exhibit the great virtue of consistency, it is at this particular point in this case very little assistance either to the Court or to counsel.

Now we shall discuss, if your Honors so please, in due rotation, clauses of the decree that deal with divorcement, but I say now that the striking dissimilarity between the Government's draft and ours—I said "divorcement", I meant competitive bidding—the striking dissimilarity is that the Government says in effect there shall be competitive bidding, (4017)

period; make what you will of it; do the best you can with it. That I respectfully submit is not a decree appropriate to this case, and we have undertaken to foreshadow and outline as best we can the machinery by which this system is to be put in operation. Our machinery may not be the best; it may not be perfect. Suggestions may be made by which it can be improved, but the decree must be vocal on that question if it is to amount to a decree at all by which the conduct of these parties can be guided.

But mounting of the general declaration that there must be competitive bidding, the Government proceeds further and

says there must not be competitive bidding, however, between the major defendants at the bar. I respectfully submit, having in mind the fact that the purpose of the Sherman Law is to promote and not limit competition, I respectfully submit that that is the most bizarre proposal that has ever been made in an antitrust case. It is not a proposal to enlarge the market or free it; it is a proposal to restrict it. It is not a proposal to multiply the purchaser of any commodity, it is a proposal to limit them.

Here, for instance, is Loew's, Incorporated, with 131 theatres out of 18,000. It is proposed to remove from the market of Loew's Incorporated, 3000 theatres, and those the (4018)

best. Here is Loew's producing eight and a fraction per cent, and distributing, of all the films produced. It is proposed to deny to Loew's the right to market those films in 3000 theatres, and those the best out of the entire 18,000. And that is supposed to be the protection, the enlargement, the increase of competition under the Sherman Act.

Now I submit that such a non sequitur as that has never been seriously proposed in any litigation of this character, and it falls by its own weight.

I think whatever else I have to say I will reserve in the course of the discussion of the decree.

Judge Hand: Do the other defendants wish to be heard?

Mr. Proskauer: We would like to know your Honor's pleasure as to how to take up this decree.

Judge Hand: How about the findings?

Mr. Caskey: We have those too, your Honor. They are submitted in the blue volume, and we would prefer to take them up after the discussion of the decree, because some of these findings will be dependent upon the indication of the Court's opinion in the decree.

Judge Hand: It is your desire to take up the decree first?

Mr. Caskey: Yes. We would like to take it up section by section.

(4019)

Judge Hand: Well, I do not know that we have any objection to that.

Mr. Cooke: If the Court please, I would like to be heard on behalf of Universal. I do not know that this is the appropriate time. I do not like to step into the middle of this fight.

Judge Hand: Go ahead if you would like to be heard.

Mr. Cooke: We take this position, your Honor: first in respect of competitive bidding, we agree that much has been said here about the ineffectiveness of competitive bidding and its unworkability. We go further than that and we say that the imposition of such a regulatory system is not within the judicial power, that these provisions are legislative and not within the powers of an equity court.

Now, in that connection—

Mr. Davis: Mr. Cooke, would it be possible for you to either raise your voice or turn around?

Mr. Cooke: Yes, surely, I will step back and speak from here.

In the Bausch & Lomb case, the Supreme Court was presented with this problem: the Government on appeal asked that the Softlite Company file with the District Court a

(4020)
written instrument providing that it will sell its product without discrimination to any person offering to pay cash therefor, and in refusing to include such provision the Supreme Court said:

"Congress has been liberal in enacting remedies to enforce the anti-monopoly statutes but in no instance has it indicated an intention to interfere with ordinary commercial practices. In a business such as Softlite, which deals in a specialty of a luxury or near luxury character, the right to select its customers may well be the most essential factor in the maintenance of the highest standards of service."

Now certainly that is a fortiori true of this business, and therefore I approach this problem with the idea that there is very serious doubt of the legality of any competitive bidding system, as to whether the District Courts are authorized to impose such a system.

Now, Section 4 of the Sherman Act confers jurisdiction upon the District Courts to prevent and restrain violations of the Act. That is to suppress any unlawful practices and to take such measures as may be appropriate to prevent their occurrence. We do not conceive that that means that a straightjacket can be put upon a business as to the manner in which it does business; that it may be required to sell to the highest bidder and not to old customers; that it may be (4021)

required to sell theatre by theatre and picture by picture—and the latter is very important to us on account of the manner in which we offer our pictures.

Much has been said in this case about block booking, but there is nothing in the record, no evidence that we condition the sale of one picture upon the sale of another. We do offer our pictures as a whole, the entire season's product. Some of those who spoke to exhibitors yesterday said that that was what they wanted with reasonable rejection rights. Now the Government has conceded in one of its findings that it has proposed, that we do give considerable freedom in permitting rejection.

Now I speak of a competitive bidding system first because it seems to me that the Court's entire opinion depends upon the validity of it and its effectiveness depends entirely on whether that is in or out. Now if it is out, all you have is an injunction against certain trade practices, and we are enjoined with the others against participating in those trade practices.

Of course, if we are going to adhere to the letter of the opinion and not going to consider any changes therein, why I have not very much to say, but it seems to me that there are very serious differences of opinion here.

(4022)

Now take the matter of clearance: the major defendants are satisfied with the consent decree standards that the Court has outlined in its opinion. The Government says that the public interest is what should control. I take a very different position, and I think the Supreme Court takes a very different position. In the General Electric case, and in the more recent General Talking Pictures case in 1938, it seems to me that the Supreme Court very clearly laid down the rule that should be applied. It may not be so easy to apply it to particular facts, but the rule is perfectly clear; and it is not a rule that has relation to the public interest, because the public interest has been satisfied in the issuance of copyright or patent, as the case may be. That is this—and I quote from the General Electric case—and this relates to an admission-price specification:

"If the patentee goes further and licenses the selling of the articles, may he limit the selling by limiting the method of sale and the price? We think he may do so provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly."

Now that to my mind is the test of whether any of these restrictions are valid. The Supreme Court has said it very deliberately in 1938 again in the General Talking Pictures case, has reiterated. Are the conditions reasonably related (4023)

to the reward we are entitled to secure under our copyright. And it seems to me, if that be true, that the very foundations of this whole scheme are undermined.

Now the reason I mention that is that our basic position is this: our basic position is that the root of the evils in this industry are not the trade practices; that if there are any evils in this industry, the root is entirely elsewhere. We take the position that any one of these trade practices are

perfectly legal in and of themselves. Of course, if they are used in the course of a conspiracy to dominate the exhibition business, or to restrain trade, they can greatly aggravate the effects of such a conspiracy, there is no question about that, and they should be enjoined. But we take the position that we should not be enjoined. We take the position that the relief to be accorded should be along the lines of that in the Crescent case.

In the Crescent case the Supreme Court said franchises were perfectly legal in and of themselves, but it enjoined the franchises in that particular case, the continuance of them. That is, it enjoined the monopolistic aggregation that had secured those franchises. It did not enjoin the distributors. In fact, it put that question completely to one side.

(4024)

Now I find myself very much in agreement with the Government on a number of very basic things here. For instance, this question of a collective monopoly: of course there can be a collective monopoly. Peculiarly enough, it happened that a day before your Honors' decision came down on June 10th, that the Supreme Court in the American Tobacco case held precisely that, as the Government says, and I was in that case, and therefore I have a strong consciousness of it.

Then there is this matter of discrimination. I confess I am attacking the roots of your Honors' opinion because I feel that I have to, and I have submitted a memorandum to your Honors which displays my views in that connection. On discrimination, so far as I know, there is no law, no anti-trust law against discrimination. Your Honors have said in the opinion on the basis of the Interstate Circuit case, that any discriminating contract is unlawful. Now I do not understand the Interstate Circuit case to have held that at all. What I understand the Interstate Circuit case to have held is this, that if a distributor uses his copyrights for the benefit of an exhibitor, in the interests of an exhibitor, an exhibition chain, and for its purposes, that that goes outside

of what he is permitted to do under his copyright; but he is not using it for the benefit of himself to secure the reward (4025)

to which he is entitled under his monopoly, but he is using it for the benefit of the exhibition chain, and therefore such agreements are unlawful. In that case the distributors had a certain given course of business, and Mr. O'Donnell on behalf of these exhibition chains down there, occupying a very dominating position, came along and demanded that they change their practices with respect to the subsequent run exhibitors; that they require them to increase their prices to 25 cents and not doable feature. And therefore when the distributors acquiesced they did so not for their own purposes but for the purposes of exhibitors.

Now the only antitrust law I know against discrimination is the Robinson-Patman Act, and that concerns only commodities of like kind and quality.

Your Honors have said that we are in this case for one reason, one outstanding reason, that we treated in our license contracts the major defendants in respect of certain, what I consider, subordinate matters, better than we did independents.

(4026)

Now I don't think there is any way in this record of testing whether we did or not, because the most important element is the film rentals we get from a contract, and there is no evidence in this record that I know of that permits you to in any comprehensive way determine whether or contracts with the major defendants were more favorable over all than with the independents. But aside from that I take the position that we have the right to discriminate between customers. Much more important the Supreme Court has taken that position in the Colgate and the Raymond Brothers cases which were cited with approval in the Bausch & Lomb case a few years ago. And that is aside from copyright.

Now under copyright the Supreme Court said in the Interstate Circuit case that an exclusive license was perfectly

legal. Now how can anything be more discriminatory than that, more discriminatory than an exclusive license, where anybody who does not get the license is barred from getting the picture? And if that is true, and if that is perfectly legal—and that is flatly what the Supreme Court said—I cannot see how discrimination in the minor matters on our part and on the part of a non-monopolistic distributor can possibly be illegal in and of itself.

Judge Bright: Mr. Cooke, aren't you rearguing the case instead of helping us to settle these findings?
(4027)

Mr. Cooke: That is why I suggested this might not be an appropriate time for me to speak. But I believe that with competitive bidding out, if it is to go out,—there seems to be some question about it,—the entire balance of your Honor's opinion is upset.

Judge Bright: You don't think it ought to go out, is that the idea?

Mr. Cooke: That competitive bidding ought to go out?

Judge Bright: You don't think it ought to go out?

Mr. Cooke: I do, Judge Bright, yes.

Judge Bright: With the rest of the opinion.

Mr. Cooke: If by that your Honor means that I categorically disagree with the fact as found in the opinion that the root in the evil in this industry is the trade practices, yes.

Judge Bright: You said it was somewhere else. Where else was it?

Mr. Cooke: I am not taking a position on that. I think that is a matter for the Court.

Judge Hand: You think there are no evils or don't you want to take a position on that?

Mr. Proskauer: They are such little ones.

Mr. Cooke: I think the Government is amply able to take care of itself on that. My basic position is this: that in
(4028)

respect of each of these practices—clearance, admission prices, and run, and these subordinate discriminations—that

in respect of each one of them they are legal in and of themselves.

Now I think, Mr. Wright, if I understood him correctly, said that road shows—fixing of prices for road shows would be all right with distributors who did not own theatres. He conceded that. He conceded a difference between the two.

Now one of your Honors asked yesterday what was the difference in principle between fixing a price for a road show and fixing a price for any other picture. I don't see any difference in principle, and I think the position that we have a right to specify that there be no change in price during a run, that we have to negotiate our film rentals on the basis of admission prices as they are. We have nothing to do with admission prices. We have no theatres. We negotiate our licenses on the basis of things as they are.

Judge Bright: You specify admission prices in your licenses, don't you?

Mr. Cooke: Surely.

Judge Bright: Then why do you say you have nothing to do with them?

Mr. Cooke: Nothing to do with fixing them in the first
(4029)
instance.

Judge Hand: You say in your licenses they must be maintained.

Mr. Cooke: That is right, sir, and we claim under the General Electric case that we have a continuing interest in that situation and therefore we have a right to require that those admission prices be maintained.

Judge Hand: All those are serious arguments, but you seem to have one position—that we were wrong about everything whatever rights other parties such as the Government and the major defendants may have had.

(4030)

Mr. Cooke: No, I do not take that position, your Honor. I take the position in respect of certain things, yes: in respect of clearance, I take that position; in respect of dis-

crimination, I take that position; in respect of there cannot be a collective monopoly, I take that position—most emphatically!

In view of the Supreme Court decision in the Tobacco case, I do not see how your Honors can say there cannot be a collective monopoly. I am not saying this is; I am saying there certainly can be. And, goodness, the Supreme Court in the American Tobacco case held that American Tobacco, Reynolds and Liggett-Myers were a collective monopoly in so many words.

Mr. Davis: In connection with the purchasing of tobacco.

Mr. Cooke: In the purchase and sale of tobacco.

Mr. Davis: Of concerted action in the sale of tobacco.

Mr. Cooke: Certainly, fixing prices in buying and selling of tobacco.

Judge Hand: Of course, if you have concerted action, there is no question but what you can have it among a number of people and then you can say that is a collective monopoly. Nobody ever yet has denied that in this case, that I know of. They have merely denied the fact in certain aspects (4031)

of the evidence.

Mr. Cooke: That is a different matter.

Universal, as your Honors know, is unwilling to enter into any arbitration system. The reasons for that are not arbitrary or capricious in the least. They are very sound and substantial. We do not regard the matters that the major defendants have suggested for arbitration are at all appropriate for arbitration by reason of the way we look at clearance, for example. We do not think it is appropriate for arbitration to determine whether a specific clearance granted has a reasonable relation to our award of licensing our pictures. We do not think that block booking is a proper subject for arbitration here, as the major defendants have said, particularly as there is no evidence in this case of any conditioning of the sale of one picture upon another.

Judge Hand: We have said in our opinion that if you do not consent to it, it could not be done in any way that would affect you no matter who else consented, so you are over that bridge. You need not argue about it, if you don't propose to have anything to do with it.

Mr. Cooke: I just wanted to advise your Honors we had some reasons for it other than being perfectly arbitrary (4032) about it.

Judge Goddard: What are your reasons, Mr. Cooke?

Mr. Cooke: In respect of clearance?

Judge Goddard: No, in respect of arbitration.

Mr. Cooke: As I say, I think clearance is totally inappropriate to arbitration because—

Judge Goddard: Now would you determine the controversy, go into court each time?

Mr. Cooke: Well, the consent decree standards for the arbitration of clearance I regard as completely inappropriate because I do not think they have any bearing on what the problem is. The problem is whether we have imposed a restriction which is reasonably related to our award. It is a perfectly selfish test. We have been granted a copyright here.

Judge Goddard: You mean that there will be no controversies?

Mr. Cooke: Well, I suppose there will be controversies, yes.

Judge Goddard: How would you dispose of them?

Mr. Cooke: They ought to be disposed of by the Court.

Judge Goddard: In other words, you suggest they go to court each time instead of arbitration, which here has worked out pretty well? (4033)

Mr. Cooke: We disagree completely with the basis for arbitration in respect of clearance.

Judge Goddard: I think I understand.

Judge Hand: He disagrees with the standards.

Mr. Cooke: I disagree with the standards. They are objective standards that have no relation to the test that the Supreme Court has laid down, reasonable relation to our award under the copyright monopoly.

Then, I haven't heard much said about it, I understand the Government to take the position that this competitive bidding system will not be workable without arbitration. How could the Court supervise an elaborate bidding system? And it seems to me that that knocks out the props from under the whole thing. If you are not going to have arbitration, because the Government won't consent to it or we won't consent to it, how can you operate your competitive bidding system?

There seems to be a lot of sentiment to the effect that it won't work, aside from its legality.

I think the Associated Press case—I think what Mr. Justice Douglas said in the concurring opinion in that case as to what was decided—shows very clearly it is a very serious question here as to whether a court can require non-discrimination as to all applicants. In that case they re- (4034)

quired the by-laws to be amended so that papers in the position of the Chicago Sun would not be prejudiced in their application for admission by taking into consideration the fact that they were competing with the Chicago Tribune, but they expressly stopped short of ordering the Associated Press to supply its news to all non-members without discrimination. Surely the Associated Press is more of a quasi public institution than the motion picture business is or Universal is.

The Government has here, and this is perhaps more appropriate when we consider the decrees, the Government has a provision here that we offer non-exclusive runs at reasonable rates. At reasonable rates! Well, in the Hartford Empire case that is precisely what the Supreme Court said that they would not do, require future patents to be licensed

at reasonable rates. Precisely! Although they did require patents that had been used in the conspiracy to restrain trade to be licensed at reasonable rates.

Judge Bright: Is there anything in our opinion that said that a copyright owner was not entitled to a reasonable reward for his copyright?

Mr. Cooke? No, I don't think so, your Honor.

Judge Bright: Wasn't your client involved in the toils (4035)

of this case because you acted in concert with the others, in agreeing upon certain clearances and fixing certain admission prices and things of that character?

Mr. Cooke: I want to come to that.

Judge Bright: Isn't that the fact?

Mr. Cooke: That is the last subject which I shall deal with.

There have been two recent cases in the Supreme Court, the Falcone case and the Direct Sales case that point out very clearly the test to be applied in a situation like this.

Our basic position is that we dealt with the market as we found it. Of course we sold our pictures to the major defendants. They were our market or our best customers, unquestionably. What were we to do, were we to treat them as outcasts? Were we not entitled to deal with them? Certainly not. And the mere fact—

Judge Bright: We tried to tell you what you should not do and what you should do.

Mr. Cooke: In the Falcone case the Supreme Court held very clearly that merely dealing with somebody who was engaged in an unlawful enterprise, and I am assuming for the purpose of argument that, as your Honors have found, the major defendants were so engaged, for the purpose of argument only, that one had the right to deal with persons (4036)

engaged in an unlawful enterprise.

In that case certain dealers in cans, sugar and yeast had sold the same to bootleggers, and they knew they were boot-

leggers, as Mr. Justice Stone pointed out. The convictions were reversed, nevertheless, above. And in the case, two or three years later, the Direct Sales case, the Supreme Court pointed out the differentiation, that when one joins mind and hand with co-conspirators or actively cooperated in promoting their conspiracy, he was guilty of participation therein; but if he simply dealt with the members of a conspiracy, sold goods to them, even though he knew about it, that he was not guilty.

I can see, your Honors having heard this evidence in the case and applying those tests, that you might determine the thing one way or the other, but it is our position that that is all we did, that in making a master agreement with one of the major defendants, that we were guilty of no violation of the law; that there is nothing inherently unlawful about a master agreement; there is nothing inherently unlawful about a franchise; that it all depends on the way it is used.

In the Crescent case, when they dissolved the exhibition chain, the Supreme Court ordered it dissolved and it ordered (4037)

an injunction against franchises but it did not enjoin those who had granted the franchises. It enjoined those who had received the franchises, that is, the monopolistic chain.

Mr. Wright: If the Court please, may I make a suggestion? I understood the defendants had proposed to discuss the decree first, but, in the light of what your Honor said, Judge Hand, in response to Mr. Cooke on this question of a collective monopoly, it seems to me that there is a basic finding offered by the defendants on which they rely, arising out of an apparent contradiction in the opinion, which has to be resolved, really, before there can be any intelligent discussion of what kind of decree is going to be entered.

I understood you to say just now that you had no doubt that there was collective action, the parties to such action could be aggregated for the purpose of estimating their monopoly position. And the argument of the defendants, which, as I recall, was their argument at the trial, was simply that

they could not be aggregated because they had not engaged in concerted action.

As I understand the Court's opinion, there is an express finding that these five major defendants have engaged in concerted action, a conspiracy, if you please, to fix prices, to control clearances and runs, in which the three minor defendants (4038).

defendants were also participants.

The defendants have submitted as a finding a statement which appears later in the opinion that you could not aggregate the businesses of these major defendants for the purpose of determining whether or not they had an exhibition monopoly, and they have also submitted, I believe, a finding to the effect—

Judge Bright: Do you know what finding that was, Mr. Wright?

Mr. Wright: Further along, near the end.

Judge Bright: Of course, that, if it is anything, is some kind of conclusion of law.

Mr. Wright: Yes, obviously a conclusion of law but nevertheless probably a significant one in determining what ought to be done here.

Mr. Davis: Finding No. 90 on page 31, Judge Bright.

Judge Hand: Of course, we did hear the argument and disposed a great many of them as to the findings in the Aluminum case, as I remember, right in open court, and then we went in and very quickly disposed of the rest. This is vastly more complicated and I am just wondering. I would really like the serious views of all the lawyers here in this case whether we are going to get anywhere by going through (4039)

this thing in open court with a lot of talk, finding by finding; whether we haven't got to do it in our own chambers by ourselves? It was really my idea that the most fruitful discussion that could be had here was, really, along some general, pivotal lines, as to which we doubtless would make no decision on, and then go at it when we could get to it. Of

course, I cannot get to it in a minute because I just had a week in the Circuit Court of Appeals with 19 cases, and I am trying to get my memoranda ready to report for a conference, but I am perfectly willing to give now a couple of days if it is necessary for this purpose, if it does any good to anybody.

(4040)

Mr. Wright: If the Court please, for my part I agree with your Honor that you have the materials here for a paragraph by paragraph analysis which can obviously be much better made in your chambers than taken by a two-day discussion here. I wanted only to discuss, and my intention was only to discuss such aspects of the case as I thought were basic.

Judge Hand: I think that is very important to do—anything like that—and we don't pretend to overrule anybody that wants to discuss anything here within reasonable limits. But do you think it will do any good to proceed here in detail about these findings?

Mr. Seymour: May it please the Court, I think our suggestion would be, if it is agreeable to your Honors, that we proceed to take up the proposed decree, paragraph by paragraph. When we conclude that I think some general observations on our side about the findings will be our best contribution to your Honors, because the form in which the findings are set up indicate why the Government's findings are inappropriate and the findings which are not included at all in the Government's findings are appropriate to support your Honors' conclusions. But I think if we go to the findings first you would avoid an unnecessary amount of detail. And there are some findings that have not been proposed

(4041)

yet by us and will not be proposed until we have had a chance to see your Honors' views about details of the decree. I think what we would feel was important was to be able to take up with your Honors section by section the contrast in the decrees so that you would have the reasons for the various provisions we propose. Then I think it would be

unnecessary to discuss in any detail the findings. I believe if we spend the balance of the day and such additional time as your Honors want taking up the decree section by section that you will find that this form in which we have submitted the findings takes care of the subject.

While that is a little reverse of your Honor's suggested procedure, I think it will save your Honors' time.

Judge Hand: Of course, we should say, without committing ourselves in the least—and we are not committed in our own interior consciousness in the least—we were moved, all of us, by this large attack by so-called independents, many of whom were independents, on the competitive bidding system.

Mr. Seymour: I think a discussion of that will come up in a detailed discussion of the decree because we have made a proposal about that and the Government has made a proposal about it. We can thrash that out when we come to that section. But there are many differences between the decrees (4042)

between Mr. Wright's and ours. He has set up his decree to catch us everywhere he can and thinks that the aggregate of those traps or those provisions that he has made for tearing off our clothes will pretty well take the theatres away. We have beyond all set up our decree to meet the specific conclusions of relief that your Honors have suggested. I think if we could turn to that section by section it will be helpful to your Honors.

Judge Hand: I guess we better do that.

Mr. Proskauer: Supplementing what Mr. Seymour has said, if you take this decree up section by section I don't think we will bother you with too much detail. It is the simplest way of getting at the fundamentals that you want discussed.

Mr. Caskey: If the Court is familiar with the structure—

Judge Bright: Mr. Caskey, I think you wrote a letter to us in which you attached a sheet—~~not~~ one single sheet, in

which you mentioned the fundamental differences between the Government's and the proposed decree of the defendants.

Mr. Caskey: No, that was between the two different drafts that were submitted. There is no such—

Judge Bright: Oh, between the drafts.

Mr. Caskey: There is no such succinct memorandum.

(4043)

Judge Goddard: The drafts of October 7th and October 15th.

Mr. Caskey: That is right.

Judge Goddard: This yellow one is the final—

Mr. Caskey: This yellow one is the final document and the blue is the final findings. The differences in the preamble primarily relate to the Government's insertion of the specification of violation of Sections 1 and 2 in a very general manner. The opinion refers to Section 2 of the decree only in one place—Section 2 of the Act, rather, only in one place—and we respectfully submit that this generality should not be adopted; that the language which we have proposed should be used.

Remember that the only place that the opinion referred to Section 2 of the Act is in connection with the fixing of first-run minimum admission prices as tending to make as many of the 10,000 potential customers go to the first-run theatre rather than to the subsequent-run theatre.

That is the only reference in the opinion to Section 2.

Judge Hand: You want that out?

Mr. Caskey: Yes, we want the language that we violated the Sherman Act without the specification of sections and without the generality of their language which states that every violation is a violation both of Section 1 and Section 2, (4044)

which of course is not the case and is not the opinion.

Judge Hand: In what did we hold that they violated Section 2?

Mr. Caskey: The only reference was with respect to minimum admission prices where you gave the example

where you said if there were 10,000 potential customers in a community that the fixing of the first-run minimum admission price tended to divert or attract more of those customers to the first-run theatre and thereby to enhance its monopoly.

Page 26 of the opinion is the only reference to Section 2.

Judge Hand: We will underscore that. All right. We have underscored it.

Mr. Caskey: Thank you, Judge.

Paragraph I of both decrees relate to production. The basic difference is that we ask that there be added to the decree the words which would show that this Court finds that the complaint is dismissed as against the defendants as to all claims based upon their acts as producers, whether as individuals or in conjunction with others, and then these additional words "are based upon any alleged violation of the Sherman Act with respect to production including all claims based upon alleged acts of discrimination against producers." (4045)

That is to make the decree as substantially in harmony with the amended petition and to grant us a decree as to production which is in harmony with the amended petition which is dismissed.

Judge Hand: I don't know that Mr. Wright would have any objection to that.

Mr. Wright: We have a very strenuous objection to that.

Mr. Caskey: I wasn't so hopeful.

Judge Hand: Well, what is your objection to that?

Mr. Wright: Well, if the Court please, our proposed judgment states exactly what the Court found.

Judge Hand: Never mind that. What is your objection to this?

Mr. Wright: Well, that it goes beyond what the truth is as disclosed by the record. The fact that the control of distribution which these defendants possess and jointly exercised, and their control over exhibition is in itself a discrimination against independent production. There was never any surrender by us of any claim that their restrictive

practices did have the effect of restricting the opportunities of producers to market their product in a free market. Now those restraints exist by virtue of distribution practices that were found here.

(4046)

Mr. Caskey: I disavow that—I disavow any such intention.

Judge Bright: You do what?

Mr. Caskey: I say we disavow any such intention to cover the matters—

Judge Bright: It was discussed on the trial when we were talking about whether there was a claim against a producer. I think Mr. Wright made the statement then—

Mr. Caskey: Yes, sir.

Judge Bright: Mr. Wright then made a rather blanket admission that the producers—

Mr. Wright: I think if your Honor will read the minutes you will find that I pointed out at that time that we did hold that the distribution practices of these defendants and their exhibition monopolies in and of themselves did restrict unreasonably the opportunity of independent producers to find a market notwithstanding that the activities of these defendants as producers had not been such as to constitute a monopoly or a restraint of trade.

Judge Bright: I was wondering if you didn't later make a broader admission than that.

Mr. Wright: I think that we did not. If somebody could point to it I think we can discuss that. But clearly

(4047)

our position is as we stated in the memorandum that this is not a correct—this admission is not justified by anything that we conceded or that the Court found or that it could find from the record before it.

Mr. Caskey: I think it is clearly covered by the concession which was made and is also covered by the failure of proof. The supplemental complaint here and the petition have many pages of charges with respect to production, and

this is a summary or shorthand condensation of them and is intended, as it says, to relate to the activities of the defendants with respect to production.

II in both decrees relates to distribution activities.

In the preamble we have suggested that there be added after the enumeration of the parties the words which are found in the last and next to the last lines, "one acting as a distributor of features", and we make the corresponding suggestion when we come to Section III which relates to exhibition.

These defendants act as both distributors—it is on page 13—

Judge Hand: Yes.

Mr. Caskey: We want to make it perfectly clear, if your Honors please. The purpose is obvious, to separate the distribution activities of the defendants from their activities as (4048)

exhibitors, and to prevent any claim of a contention that a license agreement between, let us say, Twentieth Century-Fox and Loew's, Inc. was an agreement between two distributors.

Judge Bright: Any objection, Mr. Wright? Is there any objection to the insertion of the words "when acting as a distributor or when acting as a distributor"?

Mr. Wright: If that is the purpose we certainly do object to it. Our contention has been all along that when that happens they are making agreements between two distributors and between two exhibitors, that that is the effect of such an agreement.

Mr. Proskauer: Another way of arguing for divorcement.

Mr. Caskey: I deals with fixing the minimum admission price. We took the liberty of departing from the Court's language which read "either in writing or through a committee or through arbitration or upon the happening of any event or otherwise," to insert the more general and comprehensive language "in any manner or by any means" in our proposal, which is on the fifth line of our proposal.

We are enjoined from fixing the minimum admission price in any manner or by any means.

Judge Bright: Any objection to that, Mr. Wright?

Mr. Wright: If you prefer that language to the language (4049)

in your opinion, we see no reason why you should not, up to that point. That is not all of his provision.

Mr. Caskey: We next provide in recognition of the factual situation that every exhibitor has an admission price, that clearance is involved, and that—

Judge Hand: Wait a minute.

Judge Bright: Which subdivision are you talking about?

Mr. Caskey: The next proviso in 1, that we may require an exhibitor to state the admission prices fixed by him which he intends to charge during the exhibition of the particular picture licensed.

Now, that has two bases: First, it has the basis of clearance. The Court recognized in its opinion that the amount of clearance which might be granted was in part determined by the admission prices of the theatre having the prior-run and the subsequent-run, provided those admission prices were set, fixed, or determined by the exhibitor.

Mr. Proskauer: Page 62 of the opinion.

Mr. Caskey: Page 62 of the decree part of the opinion.

The Court also recognized that in licensing pictures we were entitled to measure our film rental by a percentage of the gross receipts, and in its opinion at page 32 indicated (4050)

that the distributor would be inclined to seek out the higher-priced theatres for the earlier runs.

Now, for those reasons we think that the decree should frankly provide that the offer to license by the exhibitor should state the admission price which he proposes to charge.

Mr. Proskauer: That we may ask him to state that.

Mr. Caskey: That we may ask him to state that. The price in the case of competitive bidding is obviously a

necessary factor, as 40 per cent of 30 cents probably will be greater than 40 per cent of 25 cents. At any rate, it is a factor which the distributor must know and evaluate.

Now, I realize that it can be said that we are getting close to an agreement, but the Court recognized that difference, recognized that there is a difference between an agreement which carries with it the very definite penalties which were carried in the forms of license agreement used until the trial of this case, and the statement by the exhibitor of what he intends to charge as a basis both for fixing picture clearance and as a basis for evaluating competing bids from competing exhibitors. We think it absolutely necessary and we think it should be, frankly, included in the opinion.

Judge Goddard: The decree.

(4051)

Mr. Caskey: The decree, yes.

I assume there will be objection.

Judge Bright: You have already objected to that earlier this morning, haven't you?

Mr. Wright: I think so. I will elaborate. We object to it, and I think we would prefer no anti-price-fixing provision whatsoever rather than the one with the qualification that these people have included in it.

Mr. Proskauer: Your Honors, I am intrigued by the suggestion he would prefer no price-fixing agreement. That form of argument is, I think, not conducive to the creation of a good decree. Let us see what we are talking about. We are enjoined from price-fixing. The Court has recognized in its opinion that the price which a theatre normally charges—and where we all know every theatre has its regular price—is a factor in two aspects. I am not saying this; the Court said it. The Court said it was a factor in fixing clearance and it was a factor in determining who was the high bidder. All we are asking to put in is a proviso—that the injunction against price-fixing does not deter us from getting that information from an exhibitor as to what his normal rate is that he is going to charge, and that is all.

Judge Bright: Suppose an exhibitor on one of these bids submitted a price and said, "I will give you 40 per cent of (4051a)

my gross; and I will guarantee that my gross will not be less than \$40,000," and not specifying his admission prices, why wouldn't that answer your problem?

(4052)

Mr. Proskauer: It would, but suppose he said, "I don't want to give you a minimum. I am telling you I am going to charge 30 cents," and I say, "All right, I will charge you"——

Judge Bright: No, he does not specify, he does not agree to any admission price; the exhibitor does not agree to any admission price, but he says, "I will pay you 40 per cent of my gross which will not be less than \$40,000."

Mr. Proskauer: We would take it in a minute if the figures are right.

Judge Goddard: That does not take care of the clearance.

Mr. Proskauer: It does not take care of the normal situation.

Let us take a man who won't be quite as outspoken as our new exhibitor, Judge Bright, is, and he comes along and says, "I am willing to give you 40 per cent but I am not going to give you any maximum or any minimum." And another man says, "I will give you 40 per cent." All we ask is that in determining which is the highest bidder we are not deemed guilty of contempt of court when we ask a man who offers us 40 per cent, "What are you going to charge?" That is all there is to it.

Judge Bright: Aren't you right back in the same position (4053) ?

that you were in the beginning of this litigation? That is an implied suggestion to him that if he wants what he wants he will have to charge a certain admission price.

Mr. Proskauer: No. At the beginning of this litigation we actually made a contract with him that he had to charge

so much. Now all we are asking is that we ascertain from this man how much he intends to charge.

Judge Bright: What is the fundamental difference? What is the fundamental difference between the two methods?

Mr. Proskauer: The fundamental difference is that we are not in the first instance doing the thing that your Honor said was improper.

Judge Hand: That is true but you are suggesting to the man that if he does not charge enough he won't get the picture.

Mr. Proskauer: Let me put it another way: Of course we are suggesting that, but suppose you had a picture, and you were working under this form of decree that is suggested here, that you are going to give it to the highest bidder, and two men offered you 40 per cent each, and they had exactly the same number of seats in their theatres, and you wanted to determine which was the biggest bid—don't you think that you would like to know how much each man proposed to charge? .

(4054)

Judge Bright: Well, I have been wondering whether your inquiry as to what his admission price would be would not have implied on the end of your question the words "or else."

Mr. Proskauer: Everything can be viewed from that point of view to some extent, but I would like to ask you, if I may, how you would answer my question. You are charged with the obligation of giving a picture to the highest bidder, acting reasonably, and two men come in and offer you 40 per cent, what is the harm in saying to that man, "What else?" He has not got any right to the picture. We are going to give it to the highest bidder.

Judge Bright: The only way I could answer it, Judge Proskauer, is to say that it seems to me you are right back where you started from on this question of admission prices.

Mr. Proskauer: Well, I do not know quite what the significance of that is. We are not asking that man to charge a given price. We are not asking him to agree to anything.

Judge Bright: You said you did not before, that you did not ask them, but that the exhibitor always fixed the price.

Mr. Proskauer: But our agreement—in most instances the exhibitor agrees to it. I am going to make a personal admission. I do not think this is so important for this reason (4055).

son, that everybody knows what every theatre charges. This is a uniformity here which comes not from any price-fixing but from just the fact that Broadway theatres charge \$3.50 or \$4.00, or whatever it is, and certain types of theatres charges 50 cents, and certain ones charge 75, so we know that. But we do not want to go to jail for asking a question when we are trying to determine which is the highest bidder.

Judge Bright: You could easily keep out of jail by not asking the question.

Mr. Proskauer: I am not so sure. Suppose that we did not ask the question, and the fellow comes in and says, "I was the highest bidder because I was going to charge a dollar and the other fellow as only going to charge 50 cents, and therefore you violated the decree."

Judge Hand: You can get rid of some of these complexities by having no percentage arrangements, having a flat rental.

Mr. Proskauer: Yes, we could also get rid of it by our jumping in the river and putting a torch to all our theatres.

Judge Goddard: And the question of admission price comes up in the question of clearance.

Mr. Proskauer: Yes. Your Honor has said here in words that the admission price should be taken into account in (4058)

determining clearance. Why can't we ask, "What is your admission price?"

Mr. Caskey: It seems to me that we have got to stick to the position that the vice is the agreement. Now, it is perfectly true that the testimony in this case was that in

making the agreement, that the initiative came from the exhibitor and that usually the agreement was simply the incorporation of the exhibitor's practice which had been the case with respect to pictures which had been sold to be exhibited at a higher admission price than currently enjoyed. But as Judge Bright has said, once we get past the point of who originated the figure, there was an agreement coupled with elaborate provisions for its enforcement.

Judge Bright: Well, there is some comment on that subject in our opinion.

Mr. Caskey: Yes, exactly.

Now, in any competitive situation it is impossible, it seems to me, looking at it realistically, to ignore the fact that admission prices are going to be discussed, and that is why we put this thing right out in the open rather than deal with it in any covert manner. If you have two exhibitors who really want the picture, and who are urging upon the distributors their desirability as the potential buyer, it is inevitable on a suggestion by one that "My price will be (4057)

higher, your film rental will be higher, because my gross receipts at the box office will be higher because of what I charge multiplied by the number of people that come in."

Mr. Proskauer: Might I suggest that we leave this with the thought that your Honors will read those portions of your opinion that are quoted in our first column here on page 2, and give us what you think is right under that opinion. That is what we want. We want to conform with that opinion.

Judge Hand: We will adjourn until 2.15.

(Recess to 2.15 p.m.)

(4058)

AFTERNOON SESSION

Mr. Caskey: Section 2 deals with clearances granted by concert. We have eliminated from the plaintiff's proposal the words "or any exhibitor," so that the prohibition reads "From concertedly agreeing with each other to maintain a system of clearance."

The reason for the suggested elimination is that any clearance involves an agreement between a distributor and an exhibitor and we do not feel that this Court meant to condemn a situation such as we might have, for example, in Boston where Fox licensed its pictures first run to a theatre operated by Paramount and granted it a clearance of, say, 28 days over other theatres in Boston. That we understood this Court to say was perfectly lawful.

If another distributor, let us say, Warner Bros., licensed some of their pictures to the same theatre operated by Paramount and grant, as they may well, the same clearance in number of days with respect to that picture, we do not think it falls within any condemnation of this Court.

Therefore, we suggest respectfully that the words by the plaintiff "or with any exhibitor" should be eliminated and that the prohibition be against a concerted action among the defendants, as distributors.

Likewise, in the footnote, we have inserted in our pro-

(4059)
posals the words "which are essentially agreed upon between the distributor and its licensee." We think that the essence of clearance is agreement, and that for there to be a clearance arrangement or agreement there must be a contract. To be sure, that contract can be implied from the circumstances, it can be spelled out from conduct. We are not arguing that the only type of clearance in a contract is that that is embodied in a license agreement. We have accepted the Court's suggestion that the word usually stipulated in the contract be taken, but we do say that it is of the essence that

this decree recognize that there is no clearance unless there is an agreement.

Let me illustrate: in New York we license the Music Hall to play a picture and we grant it 14 days' clearance-over all theatres in the five counties comprising New York City. That, clearly, is clearance, and if we were to violate it, we would be subject to action by the exhibitor. It is also perfectly true that when we have a picture which we intend to exhibit in the Music Hall we will not exhibit that picture, let us say, in Poughkeepsie or in Princeton, New Jersey, until it has commenced or completed its exhibition in the Music Hall, because, acting as a distributor, in a desire to attract as many people to the theatres in Princeton and in (4059a)

Poughkeepsie as possible, we want the benefit of the advertising and the exploitation from the Music Hall, but that has nothing to do with clearance; there is no clearance between the Music Hall in New York and the theatre in Poughkeepsie. There may be an interval of time, but that interval of time is not dictated by any agreement with the first-run exhibitor in New York but is dependent solely upon the business judgment of the distributor.

Those are the two important points in this section.

(4060)

Judge Bright: What do you say about those, Mr. Wright?

Mr. Wright: The question that he raises here in the defendants' proposed form of judgment is how many agreements it takes before you have one that is illegal. Now, when he says here "from concertedly agreeing with each other," I take it the word "concertedly", while taken from the opinion in that connection is an obvious redundancy—

Mr. Proskauer: Is what?

Mr. Wright: An obvious redundancy. If these defendants agree with each other to maintain—if two or more agree with each other to maintain a system of clearance, I take it that that agreement is clearly illegal.

Now, he further has a qualification that he insists that that system also be maintained by clearances which are expressed in terms of other agreements in addition to the agreement among the defendants themselves to maintain the system. Now, that clearly imposes another requirement there that is wholly unnecessary, to reach an illegal result. When you have two or more of these people agreeing with each other to maintain a system of clearance, you have exactly the kind of concerted action with respect to clearance that this Court condemned in this opinion, and that has always been condemned.

(4061)

Now, as to our inclusion of a condemnation of an agreement between one of these defendants and an exhibitor not a party to the suit to maintain a system of clearance, it seems to us that that was clearly contemplated in the quoted section of your opinion which is set forth here.

It says, "The defendants should be enjoined from concertedly agreeing to maintain a system of clearances as among themselves or with other exhibitors."

Now, clearly, we think that is what should be done, and that is what we have done.

Mr. Bright: Would that prohibit an agreement between any one of these distributors and any single exhibitor?

Mr. Wright: I should not suppose so. The qualification there is supplied by the phrase "maintain a system of clearances."

Now, I take it a system of clearances involves something more than simply an agreement between a single distributor and a single exhibitor as to what the clearance shall be for a particular theatre.

Judge Bright: Well, might it be said that such agreements between a single distributor and a single exhibitor

(4062)

over a period of years would be a system as to that theatre?

Mr. Wright: Well, what you would have to have to amount to the maintenance of a system—my answer to that

would be no. I would think that the word "system" to me implies something more than mere continuity in time; it implies clearance as a device to maintain a particular competitive situation or a competitive position with respect to a group of other theatres in the area over a substantial period of time, but clearly a mere agreement between a distributor and an exhibitor as to what the clearance should be at any particular time for a particular theatre would not, in my view, be the maintenance of a system.

(4063)

Mr. Davis: If the Court please, I just want to seize one of the rare opportunities for agreeing with brother Wright. I agree with him that the adverb in "from concertedly agreeing" is redundant, and I would suggest that it should be "from agreeing with each other to maintain a concerted system of clearances."

Mr. Proskauer: Did I understand Mr. Wright—I couldn't hear him—to agree that in any event Warner as a distributor could agree with Metro-Goldwyn-Mayer as a distributor for a particular clearance? Am I right?

Mr. Wright: When you are talking about Warner and Metro-Goldwyn-Mayer, we disagree with that. We say that any agreement of that kind between them is unlawful.

Mr. Proskauer: Let's see what you said. That we should be enjoined: "from concertedly agreeing to maintain a system of clearances as among ourselves or with other exhibitors," and you also said that "the foregoing has been directed to the validity of clearance provisions resulting from separate negotiations between individual distributors and exhibitors, and, as stated, we believe their reasonable use to be lawful."

And then you go on, "It is here claimed by plaintiff, however, that the distributor-defendants have acted in concert in the formation of a uniform system of clearances for the theatres to which they license their films and that the exhibitor-defendants have assisted in creating and have acqui-

(4064)

enced in this system. This we find to be the case and hold in violation of the Sherman Act."

That we want enjoined—at least we ask in this decree to be enjoined. But we don't want to be enjoined from doing what your Honors expressly say is reasonable and lawful and reasonable and lawful for any distributor whether he is a defendant or not, to agree on a particular clearance with any exhibitor, whether he is a defendant or not.

Now the difficulty with Mr. Wright's words as he now interprets them is this: "from agreeing with each other or with any exhibitors or distributors to maintain a system of clearances," and he says that if we do the particular thing that you said we could do with each other, one of us with another, that that violates this injunction about maintaining a system of clearances. That means that Mr. Wright's provision as he interprets it now——

Mr. Wright: Excuse me, Judge; we didn't say that at all. I said we regard such an agreement as illegal. We don't regard it as reached by this particular provision. This provision I take it was intended to reach the kind of agreements you might make generally, not the agreements you make with each other.

(4065)

Mr. Proskauer: Now I ask you the question, would you regard it as a violation of your language if Warner as a distributor made a clearance agreement with Metro-Goldwyn-Mayer as an exhibitor?

Mr. Wright: No, I do not think that would fall within this particular provision.

Judge Bright: In a particular theatre.

Mr. Proskauer: In a particular theatre as to a particular picture. What is the answer?

Mr. Wright: The answer is no, that it would not fall within this provision although we would regard it as illegal because in essence under our contention—which I will develop later—these people do not have the capacity to act

separately as distributors and exhibitors for the purpose of avoiding liability. I think in Sherman Act cases you have got to consider them as units and view them in that respect.

Judge Proskauer: We are threatened with an injunction here which is very serious for us.

Judge Bright: Could the language be clarified so as to make an exception of these things? Mr. Wright says in his opinion it would not violate this particular provision. I have in mind, say, for instance, that Warner wanted to license a picture to the Paramount Theatre in this city, and they give them a 14-day clearance, would that be a violation of the injunction?

(4066)

Mr. Wright: That would only violate the provision that we have in our form of judgment, the prohibition against cross-licensing. I don't see that it is involved here.

The Court (Judge Bright): He says that would violate a later provision in the proposed plaintiff's judgment in regard to cross-licensing.

Mr. Proskauer: We have discussed that already. I have said all I want to say on cross-licensing. I am talking about clearance as such.

Judge Bright: I have been wondering, to avoid any possible dispute about it, whether there could be a proviso put in this clause to provide for the possibility of a motion to punish for contempt.

Mr. Caskey: We would like to have it. The thing that we are trying to get at, Judge Bright, is that there are eight of us who are defendants in this case and there are three other companies engaged in licensing motion pictures with us. Inevitably a similarity develops. We license to the Metropolitan Theatre in Boston clearance of 28 days. It is very difficult to think up any reason why another distributor should do it on 27 days or 29 days or 30 days or 14 days. And this tendency toward similarity or the comparison of contracts with a single exhibitor made by different distributors ought not to come within the condemnation unless the

(4067)

Court also finds, as it has found in this case, that there was a concert of action or agreement among distributors. That of course has been condemned by the Court and should be enjoined. But what we are fearful of, and it may be that your proviso will cure it, is to be charged with having acted in concert when all we have done is to make an agreement with an exhibitor which in and of itself is fair and reasonable but which is similar, even identical, with other agreements made with other distributors dealing in the same market.

Judge Hand: Well, what Mr. Davis said was "from agreeing with each other to maintain a concerted system of clearances."

Mr. Caskey: I think that would do it.

Judge Hand: I don't see why that doesn't do it. I don't see why the defendants should object.

Mr. Wright: I don't see why they would either.

Judge Hand: Do you object to it?

Mr. Wright: Yes.

(4068)

You introduce a double element of concerted action there. I take it, if there is agreement between the defendants to maintain a system of clearances, that takes it outside the law. What you mean by an agreement to maintain a concerted system, I frankly don't know, but I assume you mean something more or different from merely the agreement to maintain a system; and if that is what you ask, then I think that the provision is much less restrictive than what your opinion said you would grant.

Mr. Raftery: Of course, your Honors, speaking only for United Artists, I am more worried about this provision because of a remark Judge Bright made. The finding of concerted action in this case was based primarily on similarities that arose from everybody selling the same way, that is, with the same clearance. If we start off and make an isolated deal, as Mr. Caskey suggests, and those isolated deals keep

piling up and up and up, we run up against the same concerted action again, based entirely on similarity, unless there is something else added to the finding that will protect the distributor, who is purely a distributor and has no theatre affiliations. That same similarity of action is no proof of concerted action.

I do not see how we, sitting over here, can at all be protected by any decree of this character. We lead right back again to the proposition that, after three or four years of (4069)

operation, you will have a series of similarities, you will have a series of individuals making complaints that the same clearance is given to the same theatre, and so forth and so forth; and we are right back where we started at the commencement of this litigation.

We are very fearful of any decree of this character, that is, we are inclined almost to say you might as well outlaw clearance entirely, which we feel is an absolute essential in the operation of our business as to put in anything as limited as that just suggested by Mr. Davis.

Unless there is a protection on similarity, I think all of us are going to be open to contempt proceedings perpetually during the operation of this decree.

Mr. Davis: I am disappointed, I thought at least Mr. Wright and I had got together, particularly getting together not only in defense of the English language, but in defense of the Court's opinion.

The thing which is forbidden is, shall agree with each other to maintain not merely a system, but a system of clearances which has been agreed upon in concept between. That is the sort of thing which I think the Court was striking at and that is the sort of thing which I think, by the mere substitution of an adjective for an adverb, putting the adjective where it belongs, accomplishes the result.

(4070)

Judge Bright: Do you object to their changing the definition of clearance in the footnote?

Mr. Wright: Yes, we do. We think that adds an additional element of agreement that is not necessarily present.

As I understand the purpose of this provision, it is not to give protection to the defendants. The purpose is to break up an existing system of clearances. You cannot break that up, it seems to me, by using a provision which simply would permit these people to go right on maintaining the clearances they have maintained before in slightly different form. That, in our view, accomplishes nothing.

Mr. Caskey: Section 3, subdivision 3 of our proposal, and 3, 4 and 5 of the plaintiff's deal with clearance when granted by an individual distributor to a single exhibitor. Our 3 is to be contrasted, in the first instance, with the plaintiff's 4.

The principal difference is that we have added to our 3 the suggestion that the clearance shall not be in excess of what is reasonably necessary to protect the licensee in the run granted or the licensor's revenue from the exhibition of the feature licensed. We think there is a duality of interest. Both the licensee and the licensor have an interest which may (4071)

be protected and that the decree should so recite. We have set forth, by exact quotation, the factors which are listed in the Court's opinion. The last one——

Judge Hand: I think there can be no doubt about the propriety of putting in that (a).

Judge Goddard: Don't you think admission prices there merely do what we have set out to prevent? Doesn't this allow a control of admission prices?

Mr. Caskey: Sir, I do not think it allows control. I think it merely sets the standard. For example, it seems to me that there is no control in granting a license of 28 days between a first-run theatre that charges 75 cents——

Judge Goddard: My point, Mr. Caskey, is this: the defendants are stipulating as to admission prices, but if you bring in control of admission prices under the guise of considering clearance and runs, you bring it in and make it one of the conditions that they shall maintain a certain admission

price. Isn't that indirectly doing what we said you should not do?

Mr. Caskey: What I am trying to say, sir, is this: Let me analogize it by a ladder, and I put the highest rung in the same position as a first-run theatre. Now, I take it that there will be nothing illegal in saying that if the first run in (4071a)

a city charges 75 cents, and if this exhibitor with whom you are proposing to make a license only wants to charge 10 cents, that his playing position, that is, the length of the clearance, should be down towards the bottom of the ladder, but that if he wants to charge 50 cents, we are not to be allowed to play much closer to the first run. I cannot see how that violates the prohibition of your opinion as to fixing prices. The determination would be on the exhibitor.

(4072)

Judge Goddard: Doesn't the exhibitor stipulate to maintain an admission price in connection with clearance? He does not get the clearance, he does not get the run, as I understand it, unless he sticks to a certain admission price.

Mr. Caskey: No, I should think not. I should think that clearly under your opinion the control, the enforcement would be gone. If you make a contract in contemplation that the first run shall charge 75 cents, and that there shall be 28 days between it and second run, and that the second run is charging and will charge 40 cents, and then, for reasons best known to the exhibitor, instead of charging 40 cents, he charges 15 cents, that there would be no remedy. I gather that that that would be prohibited, that there would be to that extent freedom.

Now, whether there would be a misrepresentation, a breach of warranty—

Judge Hand: That is true, there is that technical difference.

Mr. Caskey: Well, it is substantial.

Judge Hand: What was bothering us was whether a man faced with this kind of a situation would not in effect do

about the same thing, get or lose his license based on what he was going to charge.

(4073)

Mr. Caskey: Judge, this apparently is not the first time that you have "rassled" with this problem because—

Judge Hand: Oh no.

Mr. Caskey: —because at page 32 you said:

"The temptations to the distributor to use clearance grants to force a theatre to raise its prices and thus to qualify for prior runs having less clearance over it, and more clearance over competitors are nevertheless obvious and the courts or arbitration board should guard that this is not done. Clearance should be granted on the basis of theatre conditions which the exhibitor creates, not the distributor. The line to be drawn is indeed indistinct, but its existence is no less real."

Judge Hand: That is true. We thrashed it all out once. It always bothered me more or less.

Mr. Caskey: It is inherent, your Honor, because of the fact that none of us can change, that each theatre does have an admission price. That is the basic cause of the problem, the fact that there is an admission price for the admission of the public to the theatre.

Mr. Proskauer: Let us see if we can't clarify this a little, your Honors, in this way: We are being enjoined—I (4074)

will use the short expression—unreasonable clearance, being enjoined from going into clearance in excess of what is reasonably necessary to do certain things. Now, clearance is necessary for the protection of the licensee; it is necessary for our protection of our revenue, and your Honors wrote, and we all agreed, that in determining what is the reasonable clearance as between two theatres, the admission price of the theatre as set by the exhibitor, not as set by us, is

involved. All we have done is to recite that fact as one of the elements that are taken into consideration.

Now, Judge Goddard's question was whether in that way we would not possibly indirectly affect a man's admission price. My answer to that is that factually it is not so, because these theatres we all know set their own prices, and those prices remain continuously the same year in and year out. But—

Judge Hand: Well, that is not the whole story, because you had a system of licenses, and you insisted that they maintain them, in some cases insisted on the price itself, and you had a lot to do with it.

Mr. Proskauer: We are being enjoined from that, your Honor.

Judge Hand: I know you are, but the result of that is that you have got a standard of price—which may be (4075).

changed, to be sure—that had been created by yourselves in part.

Mr. Proskauer: And we are being enjoined from doing it.

Now, when two theatres come to us and discuss clearance, the most natural thing in the world for a theatre charging a dollar is to say, "We are a dollar theatre; we ought to have a clearance over a 50-cent theatre." And all we are doing is to use your Honor's own language, that that is one factor to be taken into account, and I think the answer to Judge Goddard's inquiry is taken from your own language, Judge Hand.

Judge Hand: I think that is absolutely true, but we are talking about the settlement of the decree, which is capable of certain modifications, my own language and other things.

Mr. Proskauer: Well, I can defend your language, your Honor.

Judge Hand: Well, that is all right, that is all I want you to do, not to say that it is my language.

Mr. Proskauer: I defend it because it is absolutely correct, factually. After we have been enjoined from fixing

prices over and above all else, it remains true that an admission price which is fixed by an exhibitor without compulsion from us, free of compulsion from us, is a factor which he (4076)

wants us to take into account in fixing his clearance and which we want to take into account in fixing his clearance. It is not determinative. It is one element that is factually relevant to be taken into account.

Judge Goddard: Judge Proskauer, don't we end up with a contract under which the exhibitor is committed to maintain that price?

Mr. Proskauer: No, not at all, because that exhibitor after we fix his clearance on the basis of his normal admission price is free to change it or do anything he pleases with it.

Judge Goddard: Is that right? After you have granted clearance at a certain admission price, he would have a right to change it?

Mr. Proskauer: Certainly, there is no contract about it; he has got a right to do it.

Judge Goddard: That does not appear in the contract?

Mr. Proskauer: Not at all.

Judge Hand: No, no, that is perfectly true. That is technically sound, as Judge Proskauer says. It may be more than technically sound. But on the other hand it may be true that he cannot get another license if he misbehaves. (4077)

Mr. Proskauer: But this follows, if he reduces his admission price when he comes to get another clearance we do not say, "You should not have reduced your admission price," but we do say that in fixing his new clearance we should take into account what your Honors have said is a reasonable factor,—“What is the admission price that you are normally charging?”

You can't isolate these things into water-tight compartments. Here is a factor that if you ask any exhibitor around whether he did not think that his admission price

was a relevant factor in determining his clearance, he would say, why, of course, everybody would agree to that. I do not think you would get an exhibitor in America to say that that was not a fair element to take into account. That is all we are asking you to do. We are not asking you to sanction any contract to fix the price; we are asking you to sanction our right to prescribe the price; we are merely saying that when we are haled up for contempt, for fixing an unreasonable clearance, or when we go before an arbitration board—

Judge Goddard: That they may take that into account?

Mr. Proskauer: That they may take that into account.

Judge Goddard: There is no contract to maintain that (4078) price?

Mr. Proskauer: Absolutely none, your Honor.

Mr. Caskey: Section (g) of our proposed III is identical with plaintiff's proposed III. Both of them are statements of what the Appeal Board held some five years ago.

The provision that the plaintiff has inserted as No. V is that we cannot enforce any existing agreement which grants clearance to any theatre not its own in which a defendant owns a direct or indirect financial interest of more than 5 per cent.

Now, if this is read in the light of the further prohibition that we cannot license the theatre at all, this becomes immaterial. That is, as I understand it, the Government is also proposing later on that in the future we may not license Loew's or Warner's or Paramount or RKO theatres, and this would strike down any existing clearance in an existing license agreement. There is nothing in this Court's opinion that justifies any such thing. This Court made no differentiation between license agreement between a distributor which owned theatres when it dealt with the other affiliated theatres.

Now, if it has reference to something other than existing license agreements, if it has reference to some vague underlying arrangement or understanding, we say that no such (4079)

agreement or understanding was proved, and, of course, it should not be enjoined.

We respectfully submit that this section should not be incorporated in any proposed decree.

Mr. Wright: If the Court please, what we are concerned with here is much more than any matter of verbiage. This is a controversy over these clearance provisions, and this controversy is basic to what was actually found here. Now, as we understand the Court's finding as expressed in its opinion, what you found was a conspiracy among all of these defendants to fix theatre admission prices, minimum theatre admission prices which was implemented by a system to fix uniform runs and clearances as well; that is, a conspiracy to fix not only the theatre admission prices by provisions in the license but to control the price differentials in the various competitive areas by uniform systems of run and clearance. So what you came out with was a system in which admission prices were geared to particular theatres rather than to the particular picture that was played at the theatre.

Now, that system having been found to be illegal, we take it that the purpose of any injunctive provisions that are (4080)

directed at clearance is to terminate that system.

Now, normally in cases where a licensing system of that character has been found to be illegal, such as, for example, the Interstate Circuit case, the Ethyl Gasoline case, the court simply voids those licenses, strikes down the whole licensing system; but what is apparently sought to be done here is to preserve the substance of the system, even some of the actual agreements themselves, subject to some adjustment, presumably, by separating legal from illegal parts of the agreement.

Now, in no Sherman Act case that I know anything about have illegal agreements been dealt with in that way. There are situations where an agreement otherwise legal has been stricken down because associated with illegal conspiracy, but in no case may agreements which have been a part, used as a

part of such conspiracy, be saved as legal even in part; and for that reason I think the relief outlined in the opinion is inadequate to actually do what the findings suggested ought to be done.

Now, as I understand the theory behind the Court's adoption of the test of legality, that it should be such clearance as was reasonably necessary to protect the licensee in the run granted, was that that was the means of transferring control of clearance from the distributor defendants (4081)

who had so wilfully abused it, used it illegally, to the exhibitors, so that the exhibitors would be the ones who would fix whatever clearance terms should prevail for their individual benefit rather than fixing by the distributors of such terms for their benefit.

Now, these people have added a qualification which I do not believe was even mentioned in the analysis, in which they have simply added as an alternative to protection of the licensee in the run granted, protection of the licensor.

Now, it seems to me—

Judge Goddard: Where is that, Mr. Wright?

Mr. Wright: That appears in the third line of their paragraph 3.

Judge Hand: Page 4?

Mr. Wright: Page 4, their paragraph 3, third line.

Mr. Caskey: I mentioned that specifically.

Mr. Wright: Now, that was picked right out of the air. There was nothing in your Honors' opinion that suggested any such test whatsoever. The test advocated there was the licensees' protection, and it had to be that test if you were going to accomplish the objective of transferring the control of the protection out of the hands of the defendants who (4082) had abused it into that of a non-party. Now, the result of that qualification—

Judge Hand: You say we should have out "or" down to—

Mr. Wright: What we say you should have, if the Court please—we object to using the defendants' proposed form of judgment as the basic one on which you operate. Now, we have given you a form of judgment which is set forth here which we say takes care of the matter properly, and that represents what we think should be done rather than any surgical operation you may perform on their proposals. But (4083)

I am simply pointing out the things in their proposal which we think tend to frustrate the purpose of the decree. And number one—

Judge Hand: You say that anyway that clause is bad, I suppose.

Mr. Wright: Number one, that qualification "or the licensors' revenue" clearly defeats the purpose of the relief and is a qualification which is not derivable from your opinion.

If there should be no clearance between theatres in substantial competition, as the Court said, clearly such clearance ought to be enjoined flatly as we have done it in our paragraph 3. There is no point in listing there as one of a series of factors which somebody might want to consider in determining whether there was a violation. If they have done that, that is a violation right there.

Judge Goddard: Mr. Wright, can I ask you this: You provide "from granting any clearance between theatres not in substantial competition." Well, I suppose that a theatre, we will say, down in Louisiana, would not be in substantial competition with Radio Music Hall here. Would you say that there could be no clearance between those theatres?

Mr. Wright: Why, quite obviously.

Judge Goddard: Well, the consequences of that—have you thought them through?

(4084)

Mr. Wright: I don't suppose that anybody has suggested that there ought to be clearance in favor of the Radio City Music Hall over some theatre in another part of the country.

Judge Goddard: Well, I think it has been suggested. It is a very great benefit to a play to make a big success in New York so that they build up a reputation before putting it in some third-rate theatre in the South.

Mr. Wright: Well, I don't understand that that is the kind of benefit we are dealing with here. I suppose that if your theory of clearance is that it is only such clearance as is reasonably necessary to protect the licensee in the run granted, it must be that what you have in mind is his particular competition in exhibiting the picture. Now as far as I know, there is no conceivable competition between a theatre in New York and one in New Orleans in exhibiting the same picture, and I would assume, of course, that the words "substantial competition" would mean theatres which were drawing from substantially the same areas—the same potential patrons.

Judge Bright: This is of your proposed judgment, did you have any particular target that you were shooting at in that or is that just a—
(4085)

Mr. Wright: The target that we were shooting at is the clearance agreements now in effect in favor of affiliated theatres. We say clearly that those ought to be knocked out in toto without further inquiry. They are part of this illegal system that was erected to protect the revenues of those theatres. We see no occasion in any circumstances to continue any such clearance in effect.

Now as to this list of factors, the Court has put its finger immediately on the vice in the admission price factor; I won't discuss that any further. But the other factors are essential factors which seem to us to simply leave the question of who gets the clearance, what clearance, and how much, up to the distributor's unrestricted business judgment.

Now it has been proven in the past that the exercise of that judgment was not—never has been sufficient to make the system operate in a reasonable manner, and we don't think that it is advisable to attempt to freeze by any list of factors

that you might recite, the determination of under what circumstances the clearance has exceeded that necessary to give the reasonable protection that your Honors said you thought the licensees ought to have. We think the only satisfactory test that can be adopted there is simply your straight test of such standards as you can get out of decided *Sherman* (4086)

Act cases dealing with that kind of restriction. That doctrine is in a state of flux right now. It may and probably will continue to change. This standard that is set up here should not be phrased in such a way as to immunize this practice from such changes.

Mr. Caskey: If your Honors please, the language at the top of 3, "or the licensor's revenue from the exhibition of the feature licenses" I previously called your attention to. It is directly deductible from your opinion at page 32, which is printed on page 3. Having printed it on page 3, we did not print it on page 4. And we think that it is directly in harmony with the decision of the Supreme Court in the *Interstate* case, and in line with the argument this morning that a clearance may be granted which is necessary to protect the licensor from the reasonable enjoyment of his copyright monopoly.

Now the reason for setting these factors out is to have some kind of objective and reviewable and understandable standard. There isn't any freeze because we have inserted the words "among others" and the whole decree of course is subject to modification in the event that this flux that Mr. Wright talks about, comes into existence.

Nothing could be clearer than the unfairness of taking this G: "There should be no clearance between theatres not (4087)

in substantial competition"—and isolating it. This *Lust Arbitration* we had yesterday illustrates that. The arbitrator says there is no substantial competition. The Appeal Board says there is. But a great many things, including location, including population, including policies of operation go into

that ultimate determination. And that is why we assume that the Court correctly listed it among the factors and why we have done it. If it were a question of black and white possibly it would be all right to isolate it. But it isn't. It is a question of very dark gray—an almost imperceptible difference of shade.

It is a question of ultimate judgment of the person who has to review it.

Now it may be correct theoretically that there should be no objective standards, and that the whole determination should be the bargain between the distributor and the exhibitor as to what is reasonably necessary to protect the licensee in the run granted and to protect the copyrighted monopoly. But as Judge Goddard so clearly pointed out this morning, we do have controversies about these things and if we are to have controversies and to have any effective method of determining them, we must have reasonable objective standards. These standards more or less are from the consent decree. They worked well. They furnished a (4088)

basis for a determination by independent men that have been generally accepted and we urge the Court to include that in this decree.

Judge Goddard: You agree that there should be no clearance between these theatres not in substantial competition but you ask that these factors should be taken into consideration in determining whether there is competition.

Mr. Caskey: That is what the Supreme Court said in the matter of Colgate, which was decided in 1941 and which we have decided to live up to if your Honors please.

Mr. Cooke: May I say a word about 3 and 5? I don't agree with the Government or with the major defendants. I agree with the Government to this extent, that in the memorandum submitted to your Honors it said that there was a substantial body of law which should govern the restrictions in this situation, that is, matters like clearance. I very definitely agree on that. The Government didn't name any of the cases and I would like to inquire whether or not

among those cases is not the General Electric case and the General Talking Pictures case, and whether or not the test in those cases as laid down by the Supreme Court was not the reasonable relationship of the restriction imposed to the licensor's reward. I think it is inescapable that those cases (4089)

must be intended in the substantial body of law referred to by the Government.

Now this which is proposed by the major defendants, frankly, I think it is absurd. They propose that no clearance shall be granted in excess of what is reasonably necessary to protect both the licensee's interest and the licensor's interest. In other words, at the same time you protect the interests of both parties to the bargain, and I just don't see how it can possibly be done. One is antagonistic to the other. The only test is that of reasonable relationship to the reward under the copyright monopoly.

Now secondly, as to 5, the doing away with existing clearances, I think the Government is clearly right that clearances in existing agreements should be done away with as granted by any parties to this conspiracy. I think that was exactly what was held in the Hartford Empire case. The patents which were used in connection with the unlawful restraint of trade.

Mr. Proskauer: Will your Honors hear me in an endeavor to clarify this thing? There are three questions involved here. The first is the inclusion of the phrase "or the licensor's revenue from the exhibition of the feature license." That finds its root in these words in your opinion: (4090)

"A distributor will naturally tend to grant a subsequent run to and clearance over a theatre for which the owner of his own volition sets a low admission price, for the distributor will be inclined to seek out the higher price theatres first where the revenue is likely to be greater and consequently in case of li-

censes on a percentage basis where a percentage share will be higher. This, however, would seem the inevitable result of the competition for the distributor's films from theatres which are the larger or better equipped, and for which higher admission prices may therefore be charged by their operators. Such competition the lower priced theatre must be prepared to meet, or else be content with subsequent runs and grants of clearance over them."

That is what your Honors wrote. That is indubitably true. It has its basis in the record, and my friend on my right is clearly in error when he says that there is an inconsistency in any of these two factors.

(4091)

The clause that we put in is a recognition to which we are entitled in fact and under your Honor's opinion, that in determining whether a license is in excess of what is reasonable, one of the factors to be taken into account is not only the protection of the licensee's run, but also whether reasonable and not for the purpose of discrimination or monopoly. We gave a due regard to those factors which are set forth in your Honor's opinion. That is our defense of the insertion of that phrase.

The next question which arises is whether we should list factors for the purpose of guidance of ourselves, of a court on a contempt proceeding, or of arbitrators in the determination of what is the Government's injunction as they proposed from granting clearance in excess of what is reasonably necessary to protect the licensee in the run granted. I do not have to quote cases. I have quoted enough on my right. However, when you are subjecting people to an injunction, the violation of which is a contempt, it is certainly reasonable for them to say, not that we want to inject arbitrary standards that we have taken out of the air, but that you include the very objective standards to which you referred in your opinion, and we have quoted those objective

standards verbatim. In the decreedal part we have quoted them verbatim.

All that means is that we are enjoined, as the plaintiff (4092)

would have us enjoined, from granting any clearance in excess of what is reasonably necessary to protect the licensee in the run granted or the licensor's revenue, if you decide to include that phrase, and we merely add that, in determining what is a reasonable clearance, the following factors, among others, should be taken into consideration.

Mr. Wright says, by doing that, we seek in some devious way to avoid the effect of your Honor's opinion. We have quoted your Honor's opinion and we believe we are entitled to just that protection which your Honor's opinion gave us.

I raise my voice again against Mr. Wright's attitude in coming in here and regarding us as criminals who have done everything in the world. We have done certain wrong things and you are enjoining us from them, but that does not mean that we are to close our eyes to the practical necessities of this enormous business and to put ourselves in the position where we do not know what to rely on in determining whether we comply with an injunction restraining us from granting clearance over what is reasonably necessary to protect the licensee.

The third thing is this clause which enjoins Warner Bros. from enforcing any agreement made to give clearance to a Paramount affiliate down in Charleston or some other place. (4093)

What is the assigned reason for that? That the Court found that we had an illegal system of licensing. There is no point in throwing the whole industry into chaos and confusion by saying that we cannot enforce these few existing license agreements that are now in being—you are going to suspend the effect of this judgment for some time anyway—and there isn't the slightest practical good to anybody in arbitrarily inserting this clause.

Those are the three points involved, and we submit them to the Court.

Mr. Caskey: Defendants' proposed section 14 and the plaintiff's 6, relating to franchises, are identical.

Mr. Cooke: I would like to say a word on that. On the matter of franchises, your Honors, the provisions, of course, are identical and are in accordance with your opinion. We have submitted two findings on franchises. One is No. 23, page 8. Universal entered into franchise agreements with 727 independent exhibitors and 43 affiliated exhibitors. No. 22 deals with the purposes of these franchises, in order to create competition in the areas where the exhibitors had failed and refused to license the Universal product or exhibit the same. Universal induced persons, firms and corporations, to invest substantial sums of money in opening new theatres or in improving existing theatres and granted to these (4094)

accounts deals varying from one year to five years wherein and whereby these theatres were granted an exclusive right to exhibit Universal pictures for the period of said deals in the specific theatres mentioned in the agreements and for runs listed therein, whether the deal was for one year or longer.

That illustrates, it seems to me, the vice of considering these practices illegal in and of themselves. We made 727 franchise agreements with independents, only 43 with affiliated theatres, and yet every franchise we have is to be struck down here.

Mr. Caskey: Defendants' proposed subdivision 5 enjoins the further performance of existing formula deals or master agreements and from making formula deals and master agreements in the future.

The difference between our proposal and the plaintiff's primarily is in the definition. Ours are more inclusive than the plaintiff's.

As to formula deals, we propose in footnote 6 to enjoin any agreement in which the license fee of a given feature is measured for the theatres covered by the agreement by a specified percentage of the feature's national gross. That is

more inclusive than the plaintiff's, which relates only to the type of formula deal where the formula relates to a whole circuit.

(4095)

The same, in effect, as to master agreements. We have defined a master agreement as any agreement where there are not separate provisions covering the licensing of the feature for the exhibition of each picture in each theatre and not simply confined it to the so-called blanket or basket deals.

Mr. Wright: I do not think there is any difference between us with reference to formula deals.

When it comes to master agreements, there the prohibition is directed purely at an agreement which has a certain form, and as the definition says, if you have separate licenses for separate theatres—separate provisions for licensing the feature for each particular theatre, then it is all right; but the test we derived from the opinion, and which we included in our prohibition, was the question of whether or not, except for those agreements, the defendant had actually offered the film for license to competing theatres, so the effect of the agreement was not to shut off competition by individual opponents of the circuit. In that form we think the provision has some substantial meaning, and the form proposed by the defendant is a mere device which determines how you arrive at the agreement but doesn't do much more.

Mr. Caskey: That is not the intention, and, as far as we are concerned—

(4096)

• Judge Hand: Are you talking about 7 now?

Mr. Caskey: I am talking about our 5 and 6 and the plaintiff's 7—in the footnotes 6 and 7.

Judge Bright: You mean your 6 and 7 and the plaintiff's 4 and 5?

Mr. Caskey: No, the plaintiff's 7 and the footnotes 4 and 5.

As far as some of us are concerned, if you take the ambiguity out of the plaintiff's 7, that is, the text 7, and there

is an ambiguity, as you will see by reading it, which could be corrected by making it read "from making or further performing the existing formula deals," and going on down to the next to the last line and putting a period after "films," I think it would meet our purposes and the Government's.

Judge Hand: I don't quite get that.

Mr. Caskey: As your Honor reads the Government's 7, you will see that there is an injunction against performing certain types of agreements, except such as have been offered on a competitive basis, and then it goes on, "from making any similar agreements", and the word "similar", I think, is ambiguous. We thought you could correct that ambiguity by striking out that last clause and covering it by the two words to be inserted at the very beginning of the paragraph, so it (4087)

reads, "from making or further performing any existing formula deals" and so forth.

Mr. Wright: I take it you would then have to strike out the word "existing".

Mr. Caskey: Well, you could.

Mr. Wright: "enjoined from making or further performing any existing"——

Mr. Caskey: Perfectly willing to strike it out.

Judge Hand: How would that read?

Mr. Caskey: It would read, "from making or further performing any formula deal or master agreement to which it is a party except such agreement," and then it goes on down to the very bottom, and you put a period after the word "film" and strike out the words "from making any similar agreements in the future."

Judge Bright: Would that be all right, Mr. Wright?

Mr. Raftery: The definition is going to remain the same on the master agreement?

Have you agreed on the definition of 5 and 7 remaining the same? Which is going to be the definition?

Mr. Caskey: Well, we haven't got to that.

Mr. Wright: To save argument there, we will take your definition on both.

Mr. Caskey: That is agreeable to us.

Judge Goddard: You agreed on the definition of "formula"?

(4098)

Mr. Caskey: Take our footnote 6 and our footnote 7.

Mr. Wright: I take that back. If the Court please, the master agreement definition, as I pointed out before, I think we will insist on ours, because ours, I think, defines it in terms of substance instead of form.

Mr. Raftery: We won't take his. He left out—for instance, we might sit down, where a man has five theatres, and write them all up on one sheet and attach our standard form, and we would have a separate license fee and separate clearance. In other words, you would have a separate deal on each theatre and incorporate them in one rider in order to save writing all those contracts. As I understand Mr. Wright's definition, you cannot do that; you have to write a separate contract for each situation.

Mr. Caskey: We did not understand it that way.

Mr. Raftery: That is the way I read it.

Judge Hand: I did not understand so, and I thought that is just what we said in our opinion.

Mr. Wright: I agree with your Honor. I say the thing that is controlling is the substance of the negotiation, not the form of the agreement.

Judge Hand: We have already said, and I don't think you ever disagreed with that, that they could have them in

(4099)

one instrument.

Mr. Raftery: It is the words "blanket deal" that I object to, because in the blanket deal you blanket five theatres in one contract. Have it on the record it doesn't mean that. I don't care what it means.

Mr. Caskey: Some of my associates have called my attention to the fact that in all of our proposal we have

used the word "feature" or "features" instead of the word "films." If the Court adopts the compromise now suggested with this proposed paragraph 7, the word "films" which is carried in there twice, should be made to read "features".

As far as the two definitions are concerned, I understand we are in agreement that as to formula deals, we should use the one proposed by us and that we are indifferent as to whether our definition of master agreement or the plaintiff's is adopted, but that we all understand that if a master agreement has been negotiated in a competitive manner, that the results then may be incorporated in a single sheet of paper.

Judge Bright: Is there any dispute about the definition of "formula deal"?

Mr. Wright: No, one whatever.

Judge Bright: Are you taking No. 6?

(4100)

Judge Goddard: No. 6 footnote.

Judge Hand: Are you taking footnote No. 6 as his definition instead of yours?

Mr. Wright: That is agreeable to us, if you prefer it.

Judge Bright: It isn't our preference. I am wondering what objection you have.

Mr. Wright: None whatsoever.

Mr. Froelich: If your Honor please, subdivisions 8 and 9 of the Government's decree are the very crux of the case so far as Columbia is concerned, and Universal, because while we do not find the words "block booking" used in either of these two decrees, block booking was an issue and block booking was struck down by this Court.

For some reason that I do not understand, all of the parties who have submitted decrees have refrained from using it and they insert some provisions which in effect do away with block booking as practiced, such as we knew it.

In this document which the Court has, page 5, subdivision 8, is not fully printed. You will only find four lines of it. The balance of the paragraph, as it appears in the

Government decree, it is injunction against block booking, and it recites two things, one, it provides that features may (4101)

be included in a group in one contract provided the licensee shall have an opportunity to bid for each picture and shall have made the same bid and so on. Then it says, where there has been no trade showing of the pictures, why, the exhibitor may reject as much as 25 per cent. The 25 per cent, of course, is a secondary proposition, but nevertheless of importance to Columbia, because I think it is high: I think 20 per cent should be the limit. I would even prefer to see it less, because the Government professedly wants to encourage production of pictures. It says, "We want open competition. We want the greatest amount of pictures. We want a completely free market." Yet, if they want that complete market, the last thing that they can do is to discourage producers from producing pictures.

There is no reason in this case why producers, who spend their moneys and gamble on pictures, should be compelled to take back an unreasonable amount of pictures if the exhibitors don't like them. Every one has to take his risk. This Court heard testimony here from Montague and from others——

Judge Goddard: Mr. Frohlich, didn't we hear a considerable amount of testimony from independent exhibitors to the effect that they would be perfectly satisfied with 20 per cent?

Mr. Frohlich: I don't recall such testimony, but I (4102)
would be very happy if the Court would adopt that suggestion.

Judge Goddard: It was an affidavit, I think.

Mr. Frohlich: There may have been some such testimony in the case, but I thought 25 per cent is too high, because here we are with millions of dollars invested and we go down and market these pictures and then we have 25 per cent thrown back on us. It simply means we lose that money,

and where are we going to end? It simply means we are going to make less pictures, we are going to take less of a gamble, and the industry will suffer. I think that 25 per cent is too high.

Judge Hand: 25 per cent is in the opinion.

Mr. Wright: There is no percentage specified in the opinion, your Honor. We merely suggested 25. We hold no brief for any particular figure. If you want to make it 20, we are not going to waste time arguing about that.

Mr. Frohlich: The opinion was blank, your Honor, on that; there was no percentage.

(4103)

Judge Goddard: Mr. Wright, do you remember, is it not true that there were a number of affidavits submitted by independents in which they suggested they would be satisfied with 20 per cent?

Mr. Wright: I remember Mr. Levy saying here yesterday, arguing for the Motion Picture Theatre Owners of America, that he would have been happy with 20 per cent cancellation but was glad to see that the Government had suggested 25. In our view, this is a minor issue—

Judge Hand: This is section what we are talking about? 8?

Mr. Wright: Paragraph 8 of section 2 of our decree. The number that he is talking about of that paragraph appears at page 11 of the yellow document that you have there.

Judge Bright: What do you say to 20 per cent? Did you say 20 per cent is all right?

Mr. Wright: Yes, we were agreeable to any percentage the Court cared to designate, but we felt bound to make some suggestion, and we made that one.

Mr. Frohlich: In addition to that section the following subdivision 9 I think has some significance in respect to the right given to sell more than one picture, or the right to sell a group.

As I take it from the Government's decree, and from the (4104)

opinion of the Court, Columbia could sell a group or all of

its product at the beginning of the year provided each picture was sold separately and each picture was sold to the highest competitive bidder. I did not gather from the opinion that Columbia was prohibited from selling its product at the beginning of the season. My impression in reading that opinion is that it is given the right providing competitors in a given area are given the right to compete for each picture, and each picture separately negotiated, and so on.

Now, Columbia would be happy with that, but that is taken away by subdivision 9, which says you can't license your films more than six months in advance of its release. Now, that clause is a new clause. It did not appear in the Government's first decree. I do not know who suggested it Mr. Wright, but it came into this new form——

Judge Hand: Is it in the opinion anywhere?

Mr. Proskauer: No.

Mr. Frohlich: No.

Mr. Proskauer: Mr. Wright's memorandum admits that it is completely new.

Judge Hand: I don't remember it anywhere.

Mr. Frohlich: It is completely new.

Judge Hand: Now, Mr. Frohlich, I am quite interested (4105)

as well as surprised that you come in now and say that this thing which has been done, which has been represented as greater than what William Jennings Bryan used to call the time of '72 is all right.

Mr. Frohlich: You mean block booking? If I can sell my pictures at the beginning of the season, negotiate that picture separately, fix a price, give the competitor the right, that is all right with Columbia, and I would not have any kick about it.

Judge Hand: I never understood we were saying anything like that.

Mr. Frohlich: I did. Originally I understood——

Judge Hand: Well, you had very little capacity as a shock absorber I thought on that first hearing.

Mr. Frohlich: Well, I certainly was shocked when this decision came down and I first read it, because I got the distinct impression that I could not sell my pictures at the beginning of the season, but I have changed my mind since, and if your Honors say that this decision permits me to sell all of my pictures, providing I sell them separately and negotiate them separately, and conform to the other requirements, why, I can do that.

Judge Hand: I do not see why you can't.

Judge Goddard: We thought you could.

Judge Hand: I do not see why Mr. Wright should object to that feature.

(4106)

Mr. Frohlich: But he is taking this away from me, Judge Hand.

Judge Hand: Wait a minute. I know he is with this six months, and I do not know what that is; that is something new to me.

Mr. Proskauer: It is new to all of us.

Mr. Frohlich: I know why he put it in. He wants to nullify that right just the same way he wants—

Judge Hand: Well, it is probably a safer position for him for the record to nullify all rights. Here you have this right of 20 per cent of rejection that you have to give, and the other right—well, I don't know. You could not reject anything else under this proposed decree that you wish to consent to or that you say you do not object to. You would give no other right. In other words, their cancellation would be absolutely limited to 20 per cent unless they had seen the picture.

Mr. Frohlich: Yes, we have been doing that.

Judge Hand: Then supposing they had seen the picture, then they would have to reject within so many days; you would let them do that?

Mr. Frohlich: Oh no. If they have not seen the picture, then they had the right to reject 20 per cent.

Judge Hand: I meant "not."

(4107)

Mr. Frohlich: If they had seen the picture, that is something else again. If they have not seen it, they have the right of rejection.

Judge Hand: Well, I have not all the clauses of the opinion definitely in mind, but as far as I know you would be satisfied if you could bid picture by picture and were only obliged to give them a 20 per cent rejection?

Mr. Frohlich: Yes.

Judge Hand: That is an arbitrary rejection.

Judge Goddard: That is on blind selling.

Mr. Frohlich: On blind selling. We have been giving them that anyway for years, about 20 per cent, so I have no objection to 20 per cent.

Judge Goddard: But what you now want is not to be restricted to selling six months in advance?

Mr. Frohlich: That is right, because that takes away with one hand what I have been getting with the other hand. It is impossible to tell when you are going to show a picture. It may take six months or seven or eight or nine or ten months. You start off with a picture, and there are a million delays, and you don't know just where you are at. Now, if we are given the right to sell our season's product in that way, why should that be taken away?

(4108)

Now, there is another clause which is a joker, and that is the 30-day clause, and that is another one of the clauses that Mr. Wright took out of the air that is not in the opinion, subdivision (e).

Judge Hand: Where is that?

Mr. Frohlich: Subdivision (e) of paragraph 8. It is not in the printed form that your Honor has.

Mr. Caskey: At the top of page 9.

Mr. Proskauer: Why not wait until we get to it in the regular course?

Judge Bright: Where did you say it was?

Mr. Frohlich: It is on page 4 of the mimeographed decree of the Government.

Mr. Wright: It is page 3 of the yellow document.

Mr. Frohlich: And I couple that with the six months, because that is another harsh provision which absolutely protects nobody and hurts the distributor. It says each license shall specify a date of availability of a print for the run licensed, provided that such run shall commence within 30 days after such availability.

Now, how in God's name can you do that especially when you have got clearance? It is inconsistent with clearance; it is inconsistent with the right to sell your product in the way we have described it, and it helps nobody, and I think that Mr. Wright, being dissatisfied with the so-called block (4109)

booking, has evolved out of his own ingenuity the six months provision and the 30 days provision to cripple me and take away that—

Judge Bright: Mr. Wright, will you tell me why you are doing such terrible things?

Mr. Wright: Yes, I will be glad to. There certainly is no secret about it.

Mr. Levy, I think as he points out in his memorandum, came to me in discussing this decree and this proposed method of auction selling, and he was somewhat concerned with what the motion picture trade calls over-buying. That is, he pointed out to me that the auction selling provisions as such would not prevent the accumulation by a particular exhibitor of more pictures than he could use just to keep them away from a competitor. Now, the cancellation privilege may be adequate to protect—

(4110)

Judge Hand: You are more terrified and besieged by these putative intervenors than even the Court.

Mr. Wright: Well, we have had to deal with them somewhat more extensively than the Court has. But in any event, as I was saying, on this question of over-buying, that is, the

accumulation of more pictures than an exhibitor can use, the competitive method of bidding of course does not solve that or touch that problem at all, and the cancellation privilege does not either. That is, the cancellation privilege may be sufficient to protect an exhibitor from having forced upon him blind pictures that he doesn't want, but it does not prevent him from accumulating by making a deal for a year's product a large number of pictures and then holding them off the market until he exercises the cancellation privilege as a means of keeping them from a competitor.

Now that 30-day provision arose out of the same problem. That is, if exhibitors under this auction method of selling were permitted to license films wherever they were, the high bidder, without regard to the particular playing time that they had in their theatres, they could again accumulate a supply of pictures which would go far beyond their immediate needs and have the effect of holding those pictures off the market. The provision requiring playing within thirty days of availability was designed to keep that market (4111)

in a fluid condition. So that if you did not have playing time available you would not license the picture.

Now those provisions, as I say, came about in that manner, and we have offered them to the Court because we think they are essentially sound and that they would help the administration of any system of competitive bidding that the Court might devise.

Mr. Proskauer: Your Honors, these two provisions which are seemingly innocuous are quite serious. Take the 30-day provision first. Mr. Wright seems to envisage us as sitting up nights trying to find some way of over-buying or concentrating. There is no proof of over-buying in this case. It has never been suggested. We have got to sell pictures to 15,000 theatres that we don't have anything to do with, that we don't own or control in any way. You have got to service them. The proof in this case shows that our profit comes from our dealings not with one another but from our dealings

with these 15,000 independent theatres, and to cure a purely fantastic, fanciful notion—to cure a perfectly fantastic and fanciful notion that we are going to go into a conspiracy to harm our best customers by accumulating a lot of pictures which cost us a lot of money and then storing them up on the shelf, something for which there is no basis whatever, (4112)

what does he suggest? That a contract must provide an availability date and that a picture must actually be released within thirty days after that.

Now if you will read, as I know you will, your Honors, the paragraph on page 9 under the heading "Defendants' Comment," you will realize what that means in practice. We have got the problem of prints. It would be perfectly cruel for me to repeat all the evidence that your Honors will remember about this print situation. A print, as you know, costs much more than we get per license from hundreds of thousands of theatres. You can't any more practically in running this business do what Mr. Wright suggests, than I can jump off the top of this building unhurt. We don't know just when the pictures are going to be finished. We don't know just when we are going to get our prints. We don't know what the exigencies are on the return of these prints. And there has never been the slightest trouble about this availability business. When we get in shape, when we know we are going to have the print we give the exhibitor a notice of availability and he can then program his theatre.

Under Mr. Wright's suggestion, the biggest yowl you ever heard will come from the exhibitors because they don't want to be bound to an availability date where they have to produce within thirty days after that. They want a flexibility (4113)

about the availability date for the reasons that you will find set forth fully on page 9, and the thing is worked without friction, there is no trouble whatever about it. When the print situation clarifies and when we know when we are going to get a print for a man in Morristown, New Jersey,

or in Tulsa, Oklahoma, we give him notice and then our booking people get in touch with him and we arrange with him when he wants the print to complete his program. What in the world is the Government interested in in that? What business is it of any—

Judge Hand: I am not sure that they are sure that they are. I thought Mr. Wright showed some doubt about that, at any rate, in advocating it. Apparently he is not guilty of the modern crime of over-simplification.

Judge Goddard: Mr. Wright, the right to exhibit under these provisions is within ten days, so it could not be tied up for very long.

Mr. Wright: That would depend upon when that extension opportunity were made available. Of the two provisions, I myself regard the 30-day provision of more importance than the six months' limitation. If one were to go and the other be retained, I would sacrifice the six months limitation first. (4114)

I think there is a very interesting comment by the defendants on page 9 of this yellow document with reference to that 30-day provision.

Mr. Proskauer: The document is yellow only in the binding.

Mr. Wright: They say "neither the allocation of prints by a distributor nor the booking of pictures by an exhibitor should be straightjacketed."

Well, of course, that is exactly what a system of clearance does, that is, to impose restrictions in making prints available. The difference between clearances in this kind of provision as far as they are concerned is that they can control and manipulate the clearances so that they can favor the theatres that they want to favor. But in a 30-day provision of this kind you would have a completely non-discriminatory application of this print distribution, and that is unfavorably regarded by the defendants.

Mr. Proskauer: We want to favor every theatre.

Mr. Raftery: A 30-day provision, 60-day provision, 90-day provision, Mr. Wright is talking about codes in the six-month provision. He wants protection for those exhibitors who buy a block of Mr. Frohlich's pictures, and twenty per cent come in and they don't want any codes. He is not protecting the market for anybody else because nobody else (4115)

wants the rejects of anybody else.

Then you come to the 30-day provision and this applies to companies like United Artists. If we have a good picture they book them right fast. If there is a picture they don't want, they won't book, and you are not going to give a license to anybody else because they don't want it. And you have to fight with them. If you are going to put this provision in that they must buy your pictures and they must book them, then I think we are just gilding the lily about a whole lot of nothing and both provisions ought to come out.

Judge Hand: Mr. Raftery, are you as much pained about these provisions as Mr. Gerlach was in the beginning?

Mr. Raftery: I am only pained about another provision. I still think there is no price fixing in this litigation and I hope that you gentlemen might reconsider it.

As regards block booking I think we offered ample evidence that United Artists is not involved in this block booking.

As regards price fixing, we have submitted findings on that.

Judge Hand: Well, this gives you the method of distribution that you want.

(4116)

Mr. Raftery: United Artists has been distributing that way for about twenty-seven years, selling them separately and individually and to our sorrow sometimes and to our happiness at other times, depending on the quality of the picture.

Mr. Cooke: On over-buying, our position simply is that those who over-buy should be enjoined; not distributors.

On this matter of conditioning the sale of one picture upon the sale of another, we take the position that there is no evidence that we ever conditioned the sale of one picture upon the sale of another and that therefore no injunction should run against that.

Judge Hand: We are not going to review our decision on all of these details, you can be sure of that. You are wasting your time.

Mr. Davis: Now, if the Court please, we are back again on the thorny subject of competitive bidding.

We are now dealing with plaintiffs' section 10 on page 6, and defendants' number 7 on page 9.

Judge Hand: Now where are you, which page?

Mr. Davis: I am now about to make a few observations which I shall condense and make as brief as possible on plaintiff's paragraph 10 on page 6, and our paragraph 7 on page 9, which deal with the thorny subject on competitive bidding.

(4117)-

Judge Bright: What paragraph is that?

Mr. Davis: Paragraph 10(b), which is all the plaintiff has to say in aid of our effort to construct competitive bidding:

"Where a run is desired upon terms which exclude simultaneous exhibition in competing theatres, it shall be offered to the competing exhibitors involved having a theatre adequate to show the picture upon such a run and granted to the highest responsible bidder,"—and then comes the vessel clause: "provided that such exclusive run does not unreasonably restrict competition in the area covered."

Which seems to leave us about where we were when the process began.

Moreover, it is not the run which the distributor is prepared to offer, but it is the run which the exhibitor out

of his own inner consciousness desires, and when he expresses his desire for any run then it shall be offered, by what method or machinery the Government does not point out, to the competing exhibitors and granted to the highest responsible bidder, thus leaving it to the exhibitor to specify the run which shall be offered and with a limitation that he shan't get it if his getting the run would unreasonably restrict competition.

We submit that that is a wholly inadequate treatment (4118) of the subject.

Now in our Section 7, we have endeavored to carry into it—

Judge Hand: Page 9?

Mr. Davis: Section 7 on page 9. I shall only point out what are the cardinal features or principles which we have had in mind in drafting that section. I shall not take your Honors' time with the verbiage.

The first principle, which of course is axiomatic, is that the competitive bidding system shall apply only in those areas where there is competition; that if there be an area where there is but one theatre we shall not go through the machinery of competitive bidding at that theatre but we will deal with it as an independent and an isolated contractor in the customary method and manner within the other restrictions that the decree has imposed upon us.

In order to have competitive bidding you must have a competitive situation.

The second proposition which we undertake to exemplify in our draft is that the tender must necessarily come from the producer-distributor and not from the exhibitor. The person who has the article to sell must describe the article which he is ready to offer and to tender to those who care to accept his tender. It would be utterly impossible to leave (4119)

it to the multiple exhibitors to frame in advance the description of the thing for which they wanted to bid. That would

be chaos and confusion worse confounded. You never would have any starting point on which your competitive bidding might proceed. It seems to us inevitable and necessary and axiomatic that the tender of the thing which is offered must come from the producer distributor. And when he tenders it, he must also have the right to say what are the limits of his tender. He has the right to say, "I offer this on such a run, on such terms, in such area, and at such minimum figures, and such clearance." He must have the right to say, "I am ready to sell this to any and everybody but I am not carrying on a distress sale here, I am not offering it to an Irish Come-all-ye, if you please. I am saying if you won't bid this for it you can't get it at all or I will start over again," just as any public vendor of any sort. There is set up in advance an upset price below which the offeror cannot be bound in his offering.

The third proposition we set up is that there must be some sort of machinery or standard by which you can determine what is the best bid that you receive. To say simply that the best bid is to be left entirely to the discretion of the offeror, to the producer-distributor, really doesn't get us (4120)

very much farther. If it is intended that this should be regulatory machinery, the producer-distributor must have some criterion by which it can be judged whether it is or is not the best bid, and the primary criterion we present and the obvious criterion, indeed the only criterion by which the distributor should be bound are his prospects of revenue. He is not in business for his health. He is selling this license because he hopes to derive a profit, and in determining which is the best and which the inferior bidder, he must and is entitled to consider selfishly which one offers the higher reward.

Now in determining his film revenue, certain factors are involved, and among them necessarily is the admission price of each theatre as set by each exhibitor for the period of the exhibition of the features.

We come back again to the question of prices. No distributor can estimate his revenue without ascertaining what are the admission prices from which the revenue is to flow—not by contract, not by agreement, but as a fact on which his revenue ultimately must depend.

And so in Section (b) (1) on page 10 we list the criteria which the distributor may justly consider in determining his prospective revenue as between Theatre A and Theatre B.
(4121)

Judge Hand: I see.

Mr. Davis: (b) (1).

Judge Hand: Yes.

Mr. Davis: (b) (1), (2) and (3).

And we submit that without some such catalog the whole subject is left at large. Some such catalog we believe to indispensable for the execution of the Court's purpose.

Now, the fourth thing we have under consideration is that this decree necessarily cannot go into too great minutiae; that there must be rules and regulations by which these bids shall be received and dealt with and disposed of. Those rules and regulations obviously must flow from a common source. They must be described and set forth by those who make the general public offer, to wit, the producer-distributor, but provided that each producer-distributor shall draw up his regulations, rules and regulations describing the area within which the tender is made; describing the time within which the tender must be accepted, describing the form, if you please, in which the bids must be set forth. There must be some sort of mechanical uniformity about the procedure. But to avoid the suggestion that by means of those rules and regulations we seek to evade the general purpose of the Court, we provided that those rules and regulations when drawn up by the separate producers shall
(4122)

be filed with the clerk of the court and kept under judicial supervision.

The fifth thing we have to consider is when this system, if adopted, shall go into effect. Manifestly it cannot be done overnight. Manifestly the machinery of this industry cannot be suddenly adapted to this frame, and some reasonable time must be allowed for the mere mechanics of the operation, let alone the time necessary to educate the sales staffs and the executives in its adoption. We do not think that it could be done with diligence in less than six months, and that is a time drawn out of the air. I should think, with my limited knowledge of the industry, that that is a minimum rather than a maximum, and that that much time must be given if this system is to be installed in order to educate your personnel and perfect the mechanics.

And then finally we provide that if there is any violation of the competitive bidding system, those who are offended by that violation may resort to arbitration, as they would do in case of clearance or in case of other arbitrable subjects. We throw this whole competitive bidding into the arbitral machinery on those who choose—and there can be no compulsion, on that we are all agreed—on those who choose to employ it.

Now, if your Honors please, I am not going to take the (4123)

time to go over this—my friend Judge Proskauer thinks that I have been too cursory, and that I should call your attention to the fact that each such license should be granted solely upon the merits—this is the license which is tendered after bidding—without discrimination as between the exhibitors bidding for the run, whether in favor of theatres in which any other defendant has an interest, old customers, or any person whatsoever; and finally each license shall be offered and taken theatre by theatre, and feature by feature, and the distributor defendant for his protection—here is where we get a little something on the side—the distributor defendant may reject any and all offers which are the product of collusion among the exhibitors. And I think that is a possibility which cannot be overlooked in this particular

industry. I think it is quite possible the exhibitors would get together and gang up on the distributor under this machinery.

Now, we do not submit that to the Court as a system of perfection. We are not prepared to say that that is all that could be said in drawing up such a plan. We do insist, if your Honors retain this system, the decree will be utterly abortive unless it is fitted into some such frame as we have drawn. Will it be abortive or not? That is the question which none of us are willing to prophesy about.

(4124)

Mr. Arnold: May it please the Court, I think that we covered the subject of competitive bidding yesterday. I am not going to take the time of the Court to do any more than to say that these provisions prove our contention. I do not see how it is possible for anybody to read them and say that by such provisions—and we say by any provisions; I do not think provisions can be drawn; they might be drawn more complicated—that by such provisions you have given to the unreviewable business judgment of the distributors the control of distribution and have taken away all of the protection which we now have under the antitrust decision, and in return to give the exhibitor nothing more than the necessity of paying higher prices.

And I want to only comment further on the collusive bidding section. I would suggest that if you are going to set up a system of competitive bidding it would not be unreasonable to have a provision preventing collusion. So the exhibitors in this situation not being able to get together and make some kind of joint bids must form themselves into chains. It seems to me the greatest indication to concentration, and I think that the reasons, which I am not going into, I brought out as fully as I could yesterday. The reason

(4125)

is that this competitive bidding is at the wrong end. It is bidding by the weaker party for a scarce product; and the second reason is that competitive bidding does not create a

free market excepting where parties are of equal bargaining position and the product increases with the demand.

Thank you.

Mr. Stites: Your Honor, would it be out of line for an amicus curiae remark at this moment? I come from Kentucky and I represent a Kentucky association of theatre owners, and we are completely independent with one or two minor exceptions.

Judge Hand: Yes?

Mr. Stites: In Louisville we have the Loew's Theatre, which has approximately 3200 seats, and in the past has had Metro and United Artists and Columbia. We have a smaller theatre, the Mary Anderson, using Warner's, and then we have got the Fourth Avenue Amusement Theatres which have had Paramount, Twentieth Century-Fox, RKO and Republic. Now, they have a theatre that is approximately the same size as Loew's Theatre, which is 3200 seats. Now, the occasion could well arise where Warner's would have a picture which in the past has gone to the Mary Anderson, which has been a first run theatre, though it is one of the smaller theatres.

(4126)

Now, when a picture is open for bids, in all probability the Mary Anderson will be eliminated unless some provision is made so that the picture can be run for more than one week or more than two weeks. Now, the Mary Anderson has run sometimes for six or seven weeks with one of Warner's star pictures. On the other hand, it is very seldom that either Loew's or Rialto has shown a film for more than one week. Now, there is a situation where except for Loew's the State of Kentucky is completely independent, and I would say that probably the only solution to that, except Mr. Arnold's solution, would be that if the Rialto has an opportunity to bid, I say the Rialto should be able to kind of cut its own clothes in its bid.

Mr. Seymour: May it please the Court, I would like to add a word on this competitive bidding situation: As Mr. Davis and Judge Proskauer have said, we tendered in this

defendants' draft of decree a proposal which is designed to meet the suggestion in the Court's opinion that a competitive bidding system should be established. And the suggestion which Mr. Davis has outlined seems to us a fair attempt to meet that proposal.

After yesterday's argument on behalf of the independent exhibitors who so unanimously opposed competitive bidding, especially after the argument made by Mr. Jackson and Mr. (4127)

Barton, that perhaps your Honors ought to stop short of dealing with that area at all, in view of the other injunctions. Counsel for the defendants, for the five defendants represented here, discussed somewhat the question of whether under your opinion that seemed a matter that would appeal to you, and we rather concluded that the opinion shows that the Court in suggesting a competitive bidding system was really concerned about making some provision in the decree which would guard against discrimination against theatres which were really qualified by physical and other conditions to get a better run than they have, based upon favoritism to affiliates, or favoritism to circuits, or favoritism to old customers, and that basically that is what the Court was trying to get at in its suggestion for competitive bidding.

Now, I do not know that that is so, but reading the opinion that seemed to me at least to be what the Court had in mind. I personally was struck by the argument made yesterday on behalf of various of the independent exhibitors as to the complications in their operation of their theatres for them to pass from a system of negotiation to a system of bidding with all its elaborate mechanism, because however simple tries to keep it, it is bound to elaborate; and that among the various objections which were voiced here, seemed (4128)

to me to be one which perhaps your Honors would be particularly struck by. And so we tried to see whether there was some other form in which your Honors' basic notion might be cast which would carry out what you had in mind and not involve the elaborate mechanism which is inherent

in a competitive bidding system. I jotted down here a few things which may or may not be what you have in mind. I have not attempted to cast them into any definitive form. I have discussed them with counsel for the other major defendants, and if your Honors should be interested in seeing them cast in a definitive form, I think we could cast them very promptly and submit them.

Now, basically this proposal—and I want to make it clear that this is not an attempt on our part to get away from that situation of competitive bidding but merely attempt to see whether we can suggest something else that may be helpful to the Court in dealing with the problem that it had in mind. In broad outline this suggestion would be an injunction against arbitrarily refusing to license any feature on a run designated by the distributor which is requested by an exhibitor who operates a theatre in competition with a theatre which is not that distributor's theatre. In other words, where there are two competing theatres other than the distributor's theatre.

(4129)

In such cases, the license must be negotiated theatre by theatre and picture by picture. The license must be granted solely upon the merits without discrimination between bidders in favor of theatres affiliated with another defendant, or circuits or old customers, or anything else.

Then these injunctive provisions should, I should think, be implemented by reference of disputes to the arbitration system elsewhere provided for disputes as to clearance and other things in the decree, and, of course, the arbitrators would be given authority to provide proper relief in connection with such disputes.

Judge Hand: They say they won't have anything to do with the arbitration system, the minor defendants and the Government. I don't know why exactly. I have never understood why.

Mr. Seymour: Let me comment on that, your Honor. This arbitration system, as I understand it, is believed by

many people who have no axe to grind to have worked very well. It has surely been administered superbly by the arbitration system and Appeals Board.

The Court: You had set it up and the Government had set it up. His position has changed.

Mr. Seymour: Well, Mr. Wright may have strategic reasons for that position, and I do not think that that is critical to the Court decision as to what to do here. We (4130)

are not suggesting that any recourse to arbitration should be in lieu of other remedy. We are not suggesting that the Government should be barred from the usual remedies provided for the violation of a decree nor, indeed, that private parties should be barred. What we are offering is a consent rather along the lines suggested in the opinion to try to help to bring about peaceful settlement of disputes through a continuation and an expansion of the arbitration system, and I have grave doubts whether the Government's consent would be necessary.

If I may just complete this outline of this possible approach to the problem, I would suggest that these disputes as to violations of the injunctive provisions, that is, as to whether there was discrimination or whether there was an arbitrary refusal, should be arbitral under the arbitration system, and that adequate relief, of course, be provided by that system; probably that there should also be included in the decree a so-called "some-run" provision. There was, as your Honors will recall, in the consent decree a provision which assured any exhibitor of at least getting some runs. That would be supplemental, I should think, to the injunctions against arbitrary refusal and discrimination.

And then, it is perfectly plain that the use of arbitration as I have indicated and as everybody agrees, is not in (4131)

substitution for anything else, if those suggestions should appeal to your Honors as meeting the objections voiced to the elaborate character of a competitive bidding system—

and they do seem to us to strike at the thing which your Honors had in mind—we would be very glad to try to cast them in the next few days and submit them, but I haven't done that because time has been short and I did not know whether they were really along the lines your Honors were thinking along.

Mr. Frohlich: May I be heard for a moment on this question of competitive bidding? Competitive bidding sounds very good, but it is the old auction block, no matter what you call it. We had Joseph F. Day in here yesterday, who stands here ready to pick the bones, he is an auctioneer, and I think it is a strange situation where one industry in the United States, in which billions of dollars are invested, would be compelled to market its product on the auction block.

However, I think I have a further and a deeper objection to it than that. I prefer to stand on the monopoly of copyright which is involved here. I object both to the Government's and to the major defendants' outline of the method of procedure for the highest bidder for pictures.

It seems to me that when we own a copyright and we are not acting in concert with other owners of copyright, we do (4132)

not pool our products, we are not in conspiracy, we are acting alone, and we must be presumed to be acting alone under this decree, because whatever conspiracy has existed here has been struck down, we now stand, each of the defendants, on our own two feet—each is marketing his product to his own exhibitor, and in that case the sky is the limit—no one can restrain me on my monopoly. I have the strongest monopoly known in the law, the monopoly of copyright. I have a perfect right to impose any reasonable condition, where it doesn't affect other users; I have a perfect right to ask any price I please; I can sell it when and how I please; I can sell to whom I please. That right to license, to market and to publish under the copyright act is utterly unrestricted. It is completely free and I cannot be limited. I

do not see why this Court should attempt to impose a limitation on the licensing of my product, because that is what it does when it says you must sell to the highest bidder. Suppose the highest bidder is a scoundrel who doesn't pay his debts, and I don't like him? Suppose the highest bidder has a theatre down in a cheap neighborhood and destroys the value of my picture? Suppose the highest bidder is a completely unsatisfactory man, with whom I would not want to deal under any circumstances? Under this decree I am forced to deal with him.

(4133)

That, I think, is a very radical departure from all business relationships and interferes primarily with that monopoly which I urge cannot be interfered with. The courts cannot limit it; the Government cannot limit it; the Government cannot come in and take away any part of that monopoly. The only one who can regulate that to any extent is Congress and it must be done within the limitations of the Constitution.

That monopoly is so strong that I think this Court, in making a decree of this kind, may be making a decree which would be upset, and I think it is my duty to the Court to call it to its attention.

Frankly, if I were Columbia selling to the highest bidder, I could make more money; I could hold these exhibitors up and make more money. No question about it. But that is not what is involved in this lawsuit. This Court is trying to do a job, it wants to do something for the industry that will do away with evils. I am not here to oppose that. I am here to help the Court, but I think the Court is stepping on dangerous grounds when it begins to consider taking this monopoly, which is completely untrammelled, completely free, no one can impinge on it, and then regulating the operation of these copyright owners with respect to their monopoly, and it will simply invite reversal in the higher court. I would not like to see it. I would like to see the decree here

(4134)

such that nobody will appeal from it. I am honest with the Court. We don't want litigation. We feel that we haven't done anything wrong, but the decree as written up to this point would not hurt us and we are willing to be bound by all the injunctive provisions, but beyond that I earnestly appeal to the Court not to consider that proposition.

Judge Hand: Of course, these things that you are arguing I would certainly have said a few years ago were all absolutely sound and true; and, in fact, I always thought the dissenting opinion—I don't remember whether it was a dissenting or concurring opinion—in the *Vick* case of Justice Holmes was the only sound view. I don't believe all these theories of hooking on patents without further legislation to the Sherman Act, but the Supreme Court has done it again and again.

Mr. Fröhlich: But in the *Hartford Empire* case they expressly refused to do it, and that is only a recent case, 1944.

Judge Hand: It isn't because I think there is necessarily virtue in letting a copyright owner do all sorts of things, but I think there is great confusion in trying to build up all sorts of theories of law against the traditional meaning of copyrights and patents under the guise of the Sherman Act.

(4135)

Mr. Fröhlich: That is right.

Judge Hand: It fills the whole subject with confusion, to my mind, but we are entirely cognizant of that thing and there are many features of it that, as far as the practical, immediate public interest goes, are in favor of doing what has been done by the courts.

Mr. Proskauer: Before we adjourn, and I imagine we will shortly, may I just say a word in supplement to what Mr. Seymour has said?

When Judge Bright asked this morning views as to whether the other injunctive provisions—yesterday it was—

took care of the evils, that is a question we reviewed at our luncheon table yesterday: As I said this morning, we believe that the injunctive provisions took care of every transgression you have found with one possible exception, and that was the question of runs, and without elaborating on the thing, I would like to impress on your Honors in summary that what Mr. Seymour has said is that, for the first time, we defendants have come in with a suggestion, that there be the same judicial and arbitral control of runs that there heretofore has been over clearance.

If that appeals to you, I think it enables us to say that if you take that in substantially as Mr. Seymour outlined it to you, you would have enjoined wrongful conduct on our part in every area in which you have found it, and you would (4136)

have completed a coordinated injunctive system that would get the ultimate result that you had in your minds to get by the competitive system.

Judge Hand: I do not know what Judge Arnold would say to that.

Mr. Raftery: Before adjourning, your Honor, perhaps I might leave a thought with you: you will recall our contracts in evidence with our producers. We cannot license final exhibition of a single picture to an exhibitor without going back to the separate producer and getting his approval. We cannot get into any competitive business. We also have to follow his direction of the method and marketing of each individual picture. We have at the present time, I think, 23 producers telling us how to handle each individual picture. I just cannot conceive of any way that we can get into any system of competitive bidding, because we are prevented completely by contract with each independent producer.

Judge Hand: Judge Bright has to get away tomorrow at about 11 or half past 11, and I do not think there would be any use in us trying to have a session until the next day. So I think we will have to adjourn until Thursday at 10.30.

In regard to this suggestion of Mr. Seymour's, have you any remarks to make, Judge Arnold?

(4137)

Mr. Arnold: Your Honor, the suggestion comes as a surprise. I had my own opinion on it, but I will have to consult my clients, because I do not believe you want my own opinion; you want the opinion of the people I represent.

Judge Hand: All right.

Mr. Wright: If the Court is interested in the Government's opinion, I could give it to you very quickly.

Judge Hand: Go ahead.

Mr. Wright: What he is suggesting, if I heard him aright, and it is hard for me to believe that I did, was a method of insulating them by one step more from applying the principles that the Court has now said should apply to their offer of runs; if I heard him aright, he said that there should be an injunction against an arbitrary refusal to license a run designated by the distributor and then, in the event that you found a violation of that provision, then they would have to offer the picture or offer films to the person who suffered the violation picture by picture, without discrimination, in the terms that your Honor has already said they should offer them. If that is so, it is preposterous.

Mr. Arnold: May I state what I was going to suggest to my clients I understood? All of the injunctive provisions of the decree remain unchanged with respect to this, but that they would, as a matter of consent, make this offer to any-

(4138)

one who was still unsatisfied as to the injunction provisions of the decree.

Mr. Proskauer: It is a little more than that. It is what you say, but it is more. It adds to the injunctive provisions, not as Mr. Wright said in some conditional way, it adds a square injunction against unreasonable refusal of runs just as in the present decrees there are injunctive provisions against clearance. We add run to clearance, and when you

talk to your clients, you will find that has been one of their chief desires. We are enjoined from unreasonable refusal to give runs and without in any way abating the right to punish us for contempt or sue us for refusal to abide by that provision, we voluntarily offer arbitration as an additional remedy to those who want it.

Mr. Arnold: In the decree?

Mr. Proskauer: In the decree.

Mr. Wright: May I ask on what possible theory can arbitration be included in this decree when the Government, whose decree it is, does not desire to have it there? If they want to arbitrate, they are perfectly free to arbitrate outside this proceeding. I would assume that the only purpose any arbitration provision could possibly have in this decree would be for the purpose of decree enforcement. If it is (4139)

not a means of decree enforcement, why are we concerning ourselves with arbitration proposals from these people at all?

Mr. Proskauer: I would like to answer that question, if the Court would permit me. We are concerning ourselves here because this is not the Government decree. It is the Court's decree. We come in and we say to your Honors, we ask you to implement your opinion by certain definitive injunctive provisions, and if Mr. Wright is still yelling about divorce, we say voluntarily that, in order to facilitate those exhibitors who do not want to resort to expensive litigation, as Judge Goddard suggested this morning, that we voluntarily will consent that there be inserted in this decree an arbitral system under the general supervision of the courts, that we pay for, and to which anybody, who wants to resort, may resort.

We have a legal argument which I do not propose to go into at this late hour, unless your Honors want it, that your Honors have a perfect power to decree that by reason of the Government's consent in the consent decree, but that is another matter.

(4140)

What I am trying to get away from now is the divergence of this discussion on to the arbitration system, which is an incident of it. I am trying to hold it to the line that Judge Arnold was very helpfully and properly talking about.

What this thing really does, if your Honors should decide that you do not want to go through with the competition system, that is suggested, what it does is, it enlarges the area of injunctive relief from clearance and price-fixing to include run as well. And it compels us, by injunction, to refrain from arbitrary refusal to give a run. I am sure that all those who are versed in the practical details of this industry would agree that that is a great step forward.

Mr. Arnold: I hate to disappoint you, Judge Proskauer.

Mr. Proskauer: You usually do, so I am not surprised about it.

Mr. Arnold: I am not prepared at the present time to agree, but I am glad we had this discussion because I thought this was a voluntary offer which was made to the industry to assist in the decree and not to be a part of the decree. Do you insist, in formulating these provisions, that they be part of the decree?

Mr. Proskauer: Insist? We insist about nothing. We (4141)

are making the suggestion to the Court, and the only ones of your clients that will object to it are those who have good runs now and are afraid they may lose them.

Mr. Arnold: I do not know about that, but I want to make this clear. It is of no consequence to you whether or not this is put into the decree. It might be of considerable consequence, I don't know, to some of my clients because, once you put arbitration into the decree and someone chooses not to use it, anyone with the ability of Judge Proskauer or Mr. Wright, will talk about what an unreasonable man he

is to bother the Court when the decree itself provides for arbitration. I do not know what my clients are going to say.

Mr. Proskauer: I am not talking about arbitration. I am talking about the substantive provisions for the moment, and when I paid you a compliment it was because for a moment you were talking about substance and not the remedy, and now you are going to remedy again.

Mr. Arnold: Yes, that is what I am doing. All I want to find out this evening is, in making the suggestion is it of consequence to the parties making it that it be embodied in the decree or are they perfectly willing to make it a general letter to the industry?

Mr. Proskauer: Are you talking about arbitration?

Mr. Arnold: Yes.

(4142)

Mr. Seymour: I will say for myself that I visualized it as a matter to be submitted to the Court for consideration as a possible matter to be included in the decree.

Mr. Proskauer: Subject to the Court ruling, we would like it in the decree.

Judge Bright: Mr. Wright, would you object to inserting in the decree in this case a provision for arbitration providing there is also inserted a clause that it would not immunize the defendants from any proceeding that you might take on a claim that they are violating the decree?

Mr. Wright: I think we would because there just is no occasion for that kind of arbitration, an arbitration which is not intended is a decree enforcement device, arbitration which is not intended in any way to supersede the normal enforcement procedures that we would employ, to be in this decree at all. If they want that kind of system, they have got to set it up, it seems to me, outside this lawsuit.

Mr. Barton: May it please the Court, I think we should like to comment on that suggestion but I frankly don't understand it and would like to reserve the right to comment until

I have a clear conception of what the suggestion is that the (4143)

gentleman is offering. I don't want my silence to show assent.

Judge Hand: I should think you had better, perhaps, confer with Judge Arnold and Mr. Barton as to whether there was any hope of satisfaction for them in this suggestion. If what you are suggesting does not satisfy them any better than what our opinion has proposed as a remedy, why should we fuss a great deal with it?

Mr. Arnold: I want to explain our difficult position. The only thing on which all these theatres are agreeing has been that they don't want auction bidding; so it is very difficult for us to get agreement on other parts—

Judge Hand: The only thing that they all agree on is what?

Mr. Arnold: That they didn't want auction or competitive bidding, and that is what limits us in not being able to answer your question.

Mr. Proskauer: Does your Honor express any view on whether we should try to formulate this into—

Judge Hand: I think you better talk to the high contracting parties who represent your adversaries here to see whether there is any use in talking about it at all.

Mr. Proskauer: We have only one high contracting adversary and that is the Government.

(4144)

Judge Hand: I don't know that we would care to go into it if it is something that everybody is going to fight about as a proposed new remedy suggested by Mr. Seymour. Don't you think you can tell among yourselves whether it is worthwhile, to see whether you want to do it?

Mr. Proskauer: I could if it were not for Mr. Wright. I think I could sell this to Judge Arnold.

Mr. Wright: Anything you can sell to him you are perfectly at liberty to agree with him on.

Judge Hand: We will adjourn until Thursday.

(Adjourned to Thursday, October 24, 1946, at 10.30 a.m.)

(4145)

New York, October 24, 1946,
10.30 o'clock a.m.

HEARING RESUMED.

Mr. Seymour: May it please the Court, since I indicated on Tuesday that I had a suggestion that might meet what your Honors had in mind in lieu of the formality of competitive bidding, we have tried to cast the suggestion. We have it cast in rough form. Subject to consideration of details, I think we are prepared to hand up a copy of it to the Court, if the Court would be interested in seeing it.

Mr. Davis has an addendum, which is represented by a superimposed sheet, and it may be that there will be some other minor changes later on we will want to suggest.

I would like to tell your Honors what the substance of it is. It is along the lines of what I said—

Judge Hand: Has Mr. Wright seen it?

Mr. Seymour: We have just got the proof. We have not, so far as I know, furnished one to Mr. Wright yet. He must, of course, have one and we will make one available to him at once.

(4146)

Without arguing it, I would just like to tell your Honors the substance of the proposal. It does not differ much from what I said the other day. It inhibits the arbitrary refusal of a run to an exhibitor requesting a run designated by the distributor. It inhibits discrimination in the granting of runs and requires that they shall be granted on the merits. It sets forth the factors which a distributor is to consider in determining which of two theatres on the merits should have the run. It provides for the grant of some run, that is, it takes into this provision the so-called some-run provision of the consent decree, in addition to what I have already mentioned, so that an exhibitor is, in any event, assured of getting some run, quite aside from the question of discrimi-

nation and arbitrary refusal I mentioned before. And then, the controversies arising under this section are subject to arbitration with what we think to be adequate remedies by the arbitrators.

And I may say, in anticipation, if your Honors please, that we think we can satisfy your Honors that there is no doubt about your power in this case to include an arbitration system in your decree.

Judge Proskauer will present the legal argument on the subject a little later on.

Finally, this proposal makes it perfectly plain that the arbitration system does not in any way affect the Government's right to proceed for violation of the decree by con-

(4147)
tempt. And it also makes it clear that as to an exhibitor he has an election of remedies. He may choose to proceed by arbitration or he may choose to pursue his remedies afforded him by law. Obviously he ought not to have it both ways. And therefore it indicates that as to an exhibitor there is an election of remedies. But the critical point seems to us to be that it in no way effects the Government's right to proceed for violations of the injunctive provisions of the decree, and thus it provides the useful remedy of arbitration to those who choose to invoke it and provides a skilled way for disposing of controversies which involve all kinds of elaborate questions not ideally designed for consideration in the light of the usual rules of evidence and so on. In other words, it has the advantages which everybody has found in the arbitration system and which we have enlarged upon, and which your Honors have indicated in your opinion. That is the substance of this proposal. We have outlined it in substance to some of the exhibitor groups. They are in a position to give you their views about it insofar as they are able to do so today, and I won't attempt to do so for them of course.

Mr. Davis, do you want to add anything to what I have said?

Mr. Davis: The addendum of which Mr. Seymour spoke (4148)

presented by us is that we are opening up here a fresh field of adjudication and controversy between the distributors and the exhibitors, whether or not there has been a refusal of a run as requested. Obviously, no man is injured if the run is granted and he has not requested to the contrary. Now, we want to narrow the field of controversy about that request just as much as we can. That is the predicate for this procedure, that there must have been a refused request, and we do not want the question of request left at large on oral testimony between the demanding exhibitor on the one hand and our field agent on the other, because when gentlemen's rights depend upon whether or not there has been such a request, their memories cannot always be relied upon.

So we ask that the request when made shall be formalized, to be the predicate for any further proceeding, and must be made in writing and addressed to the home office of the company so that there may be some undisputable evidence that the exhibitor really made the request that is the basis of his complaint. That is a mere matter of procedure, that is true, but we think in view of the far-flung variations of this industry, it is a very important procedure and will tend to narrow at least one angle of possible controversy. That we (4149)

submit as a substitute for the first paragraph in the printed proof.

Mr. Arnold: If it please the Court, at the close of the last session the Court inquired the position of the American Theatre Association with respect to the proposal suggested by Mr. Whitney Seymour on behalf of the defendants. The proposal was not in concrete form. The idea, however, was that some plan of voluntary arbitration conducted jointly by the major companies be embodied in the decree as a possible substitute for the system of competitive bidding in opposition to which the American Theatres Association have sought to intervene in this action.

In response to the Court's request, I have conferred with counsel for the defendants as to the scope and character of their tentative proposal. I have also conferred with the representatives of the American Theatres Association who, in turn, have conferred with others over the long distance telephone. As a result we have reduced to writing a system which represents as closely as we can, without actually taking a poll, the attitude of our Association.

Our Association is a large aggregation of theatres in every part of the country. It was formed for the purpose of
(4150)

acting in the interest of the American theatre industry on all questions in which every theatre had a common interest to protect. Since our membership contains theatres of every type, there are many conflicting interests between them which the Association cannot properly represent. It was for that purpose that prior to the introduction of the issue of competitive bidding in this suit, the Association took no position whatever in the litigation. When, however, the proposal of competitive bidding was suggested by the Court, the members and directors of the A. T. A. felt that the Association could and should intervene because they believed the system would operate to the injury of all the member theatres, large and small, and in every type of situation.

The poll taken by the theatres confirmed this position. The vote was almost unanimous to oppose competitive bidding. For that reason we intervened in this court simply for that purpose.

Now, we have taken no poll on the suggested arbitration. Time has not permitted it. However, we believe that we can safely say on the basis of a sampling of our membership that if the Association were compelled to make a choice between a system of arbitration and a system of competitive bidding, they would undoubtedly choose arbitration.

(4151)

Many members of our Association called us yesterday and asked us to endorse arbitration because they feared that

If we did not approve that proposal the Court might adhere to its former position in favor of competitive bidding.

Of course, we realize that the Court in asking our position did not ask us to choose between these alternatives. We are only informing the Court as to what our position would be if we had to choose between competitive bidding and arbitration of theatre runs. Considering the question of arbitration not as an alternative to competitive bidding but, as we think the Court intended, as an independent proposition, the Association can take no position whatever. Certainly, many of our members, the number of which cannot be ascertained now, would approve of arbitration as a practical solution in a confused situation.

On the other hand, a number of our members would oppose the incorporation of any such provision in the decree. Their position is that no concerted plan of arbitration jointly conducted by the defendants and approved by the Court can possibly be voluntary in any real sense, since the arbitration of the run of any one theatre would affect all others in a competitive position. If the defendants desire to try out (4152)

a scheme of arbitration we think they should do so by making arrangements within the industry and without seeking the sanction of this Court. This we realize will be difficult. My clients, however, would, I am confident be unanimous in their willingness to participate in an industry conference and negotiations to bring it about.

That is the statement.

Judge Hand: I do not understand what the sanction of the Court has to do with it. I mean, on its practical side, that I suppose is all your clients are talking about.

Mr. Arnold: Well, I will represent what has been told me without taking a position as to whether my clients who have told me that are reasonable or not. Suppose there is theatre A and theatre B, each of which think they are entitled to a run, and each of which think that if they do not get run it is an arbitrary refusal. Suppose theatre B has the run; sup-

pose theatre A seeks arbitration. Now, of course, it would be utterly futile to arbitrate between theatre A and theatre B with respect to that run on one or any number of theatres, and then have the other theatre come in court not being bound by the arbitration and sue under the antitrust laws.

So as a practical proposition we can't conceive—and I (4153)

think the major defendants will concede this, I don't know—these people who I represent cannot conceive of how arbitration can be voluntary. Now, I do not want to argue here whether that position is a reasonable one or not, but it is a position taken by a very large number of our industry.

Judge Hand: What I was asking was how is it any more or less voluntary because it is or is not set up by a court?

Mr. Arnold: Well, if the Court please, we suggest that if all the Court is saying in the decree is "You can get together and arbitrate," it is just a perfectly futile provision. And we must be—and I must be very careful and say that the "we" I am now talking about is this group—this group does not think it is possible to incorporate anything in the decree which is not a complete futility which to a certain extent has not compulsory features. Now, that is the opinion of a group in our industry. Another group says, "Well, all right, we like arbitration."

Judge Hand: We may or may not have power; we may or may not think it desirable under the circumstances; it may or may not be true that we should do it without consent of the groups. But the difference you fail to point out in (4154)

any way that is convincing to me between something that is set up in the way you have suggested and something that is set up by the Court—that is, it just does not mean anything to me. I do not understand that.

—Mr. Arnold: Well, let me see if I can make it clear: If the Court—and I assume the Court would only want to set up a workable system of arbitration—if the Court sets up a workable system of arbitration, it allows the defendants

to combine, says this particular group; it allows these defendants to combine in that system and gives a certain psychological sanction to the arbitration.

(4155)

This group thinks that there is no possible way that these defendants can effectively combine to put in anything that will work unless the arbitration of the run between Theatre A and the distributor binds Theatre B; and they simply say it would be a complete futility to put it in the decree of the Court unless it did contain a compulsory feature. That is the argument I wished to make.

Judge Hand: You mean they want more parties to the arbitration?

Mr. Arnold: No; they say that it is impossible to arbitrate the run of Theatre A without affecting the interests of Theatre B.

Judge Hand: May the Theatre B be heard?

Mr. Arnold: If Theatre B wanted voluntarily to be heard and wanted voluntarily to arbitrate then we need nothing in the decree; but if Theatre B did not want to arbitrate, the arbitration on behalf of Theatre A would be a complete futility because, theoretically, Theatre B would, the minute the arbitration was through would sue, because he was the man who was arbitrarily deprived of the run. Do I make myself clear? That is the fear of this group, that if the Court puts anything in there that is effective at all, it will involve a certain—

(4156)

Judge Goddard: So far as you know, has that been found to be a real objection in past arbitration? I am afraid not.

Mr. Arnold: Well, I am in the unfortunate position here of representing two groups and not being able to argue whether this group is reasonable in their position, but that is their position, as the Court knows. There is one suit now pending under the old decree, not to review the arbitration but to say that it was binding people who were not parties to the decree.

Judge Goddard: We have had three or four hundred of these arbitrations. As far as I know, that point has never been raised. No objection has been raised on that point.

Mr. Arnold: There is a suit now pending.

Judge Goddard: That is the exception, one.

Mr. Arnold: And we have not polled our membership to tell you how many people take that exception. I am only now trying to represent that a certain number do, and, in order to explain what our position is, I am simply explaining why they do. Have I made that position clear? And I am not authorized to argue the power of the Court, or anything of the sort. I am simply giving an actual picture.

Mr. Seymour: May I just say that Mr. Arnold's remarks have been directed really at the arbitration part of this (4157)

proposal. Now the arbitration part of it is simply an implementation of the injunction, an additional remedy of injunction. It is the injunction which with the arbitration seems to us perhaps to be aiming in the direction which your Honors' suggestion of competitive bidding aims, because it provides for an opportunity to negotiate for a better run rather than going through a lot of formalities about bidding and enjoins us from discriminating.

I would like also to say that this suit that Mr. Arnold refers to is a suit in which Mr. Russell Hardie represents the plaintiff and in which the charge is in essence that the consent decree was an illegal conspiracy between the defendants, the Attorney General, and the court.

Mr. Arnold: That suit, incidentally, is brought by one of the members of this association. So if I made the opposing positions clear I think I have done about all I can, and we end with the suggestion that from the point of view of the consent of all the members of this association, we would be, as I said, much happier if this thing were tried out without the sanction of the court, and I think I can say that all of

them would be willing to work it out in a conference if it could be worked out.

(4158)

Mr. Proskauer: May I ask your Honors to keep as a separate matter this question of arbitration? I want to be heard on that with your Honors' permission a little later, and I shall have a good deal to say about it. Therefore I am rising to emphasize what Mr. Seymour has said. We didn't suppose that this proposal was going to precipitate the discussion on arbitration as such. The gravamen of this suggestion is that it is a further injunctive prohibition against us to refrain from discriminating in runs as well as in clearance.

Mr. Wright: If the Court please, in view of your Honors' statement the other day that you, Judge Hand, did not understand why our position had become what it is on this arbitration question and in view of Judge Bright's last question before the recess there on Tuesday, I would like to tell you fully exactly how we came to be where we are now.

When the Court suggested that the use of arbitration in connection with its proposed decree, and conditioned that use upon the consent of the parties, we assumed that since we were a party to the litigation that such relief was conditioned upon our consent as well as that of the defendants who might be subjected to it. We regarded the opinion as an invitation to sit down with the defendants and if we

(4159)

could, work out a method of arbitration which would be an effective means of enforcing a new decree. When we attempted to do so we were promptly met by a refusal on the part of three of the defendants to even discuss the matter at all—the three minor defendants. The five major defendants were delighted to discuss the matter but it became immediately apparent to us that they were not prepared to agree to any substantive provisions which would mean surrender by them of any of the power that they now have to control run and clearances.

We took to be the essence of the Court's opinion that that control must in any event be transferred from them to exhibitors who were not parties to the lawsuit.

Now in short we assumed that we were the prevailing party in the litigation. The defendants were not convinced by the opinion that they had not prevailed.

Now they regard our position in that respect as intransigent but that is what it is.

On such circumstances there simply is no basis for agreement between them and us.

In view of the fact that we have taken the position we have that arbitration on their terms would not grant satisfactory relief and therefore could not be embodied in the decree, we were somewhat surprised when they continued to press upon this court the adoption of their arbitration system. We make no secret of the fact that we view this (4160)

move with considerable skepticism and that skepticism has not been abated or changed by their present insistence that they don't intend to have the system operate as a substitute for such contempt proceedings as we might be able to bring to enforce such provisions as we thought would be effective to apply the Sherman Act to the defendants in this case.

Now it seems to me that it is quite apparent from that insistence that what these major defendants are after is a judicial sanction for an arbitration system the rules of which are collectively negotiated by them, a system which is financed by them under rules which in our view contradict rather than implement the standards of conduct that are required by the Act that this Court is here to enforce.

Now apart from that question of lack of our consent, this dilemma that Mr. Arnold referred to and which is directly raised in this suit that is now pending in the Eighth Circuit Court of Appeals, is one which I think can be passed over lightly. It is true that we think that particular attack should fail. What has happened there is that this exhibitor

in St. Louis who did not agree or intervene in an arbitration proceeding is complaining about the fact that the award which was entered without his consent in that proceeding, (4161)

or the suit in which the decree was entered, had the effect of reducing the clearance which he had previously enjoyed.

Now I don't think there is much difficulty presented by that suit in view of the fact that the awards under the consent decree are pretty carefully framed in negative terms and were consented to by the Government and were adopted only as a temporary measure subject to ultimate judicial review here to decide what the final solution should be.

But even if that is so, I think you are presented with quite a different question. If you try to incorporate in a decree an arbitration system which is not consented to by the Government, which simply represents what these defendants are willing to agree to, and which would, if it were to do anything effective at all, probably result in the grant of affirmative rights which would be more difficult to defend against the claims of non-parties to the arbitration and the suit than the kind of arbitration we have heretofore had under the decree.

Now Mr. Seymour suggested Tuesday that our refusal to go along with an arbitration proposal of the kind I have just discussed is also a strategic position on our part, and we don't deny that. We think the strategy of both the plaintiff and the defendants in this case is fairly obvious. (4162)

Our strategy is to insist that this Court direct its attention to the means short of divorcement by which the unlawful combination that has been found to exist among the five major defendants may be dissolved.

In now proposing a system of settling industrial disputes through an arbitration system jointly established by them, the major defendants' strategy is clearly directed toward the entry of a decree which will continue to let them use joint action to control the run and clearance structures we now have.

Now for the purposes of dissolving the basic unlawful combination among the major defendants, such joint agreement as evolves from luncheon talks among their counsel have little more virtue, as far as we are concerned, than the arrangements found illegal by this Court which evolve from concerted action among their clients. The fact that counsel for these five major defendants may agree on any proposal for relief against all of them is simply a guarantee that such a proposal itself will represent the lowest common denominator of whatever privilege each defendant individually might be willing to surrender.

(4163)

We insist that a primary objective of any decree that this Court enters in this litigation must be to compel completely individual and independent action by all of these defendants, and particularly the major defendants in this litigation, in their future business dealings.

There is no question about the fact that an unlawful combination has been found to exist among them, and the primary question that we are here to discuss is, I take it, how shall that combination be dissolved by provisions short of divorcement.

We have proposed here a decree which, we think, is effective for that purpose, and we are here to be heard on that decree, those proposals that we have offered, and I do not think that this time, that was set long ago, last June, to consider proposals in final form that we and the defendants have offered to the Court, should now be taken up to consider some alternative that has just been handed to us this morning, and with your Honors—

Judge Hand: That may be so, but you are making just as fundamental objections to what we decided as they are, just exactly.

Mr. Wright: I do not understand that we are, your Honor.

Judge Hand: Of course you are.

Mr. Wright: May I ask in what respect?

(4164)

Judge Hand: Your amendment here about their being unable to license to each other goes to the root of the thing, and you are re-arguing the whole thing again. I do not criticize you for it, but do not criticize them for re-arguing it.

Mr. Wright: I was not criticizing them for re-arguing it.

Judge Hand: I think you are.

Mr. Wright: I was suggesting that three or four months was sufficient time in which to have prepared and put before this Court such final proposals as they wanted to offer for inclusion in a decree; that I did not suppose that this was a point at which we would take off on new proposals which had not been submitted by one to the other.

I do not understand your Honor's statement, frankly, that our proposal is in any way inconsistent with what the Court found. As I see it, the Court found an unlawful combination.

Judge Hand: Inconsistent with what they decided. Whether they made philosophical or factual findings to the contrary is capable of argument, of course, and you are making it.

Mr. Wright: I take it the only decision that is foreclosed from reconsideration here is the decision that the combination should not be dissolved by divorcing these defendants (4165)

from their theatres. I take it that the Court did not mean to intend simply by outlining the terms of a decree to prevent the discussion here of such other injunctive relief as might be effective to dissolve the combination, particularly—

Judge Hand: I do not say that we did. I am criticizing you for criticizing other people for arguing for their setup.

Mr. Wright: I withdraw the criticism.

Judge Hand: I do not think that is important anyway. Let us not discuss it.

Judge Goddard: Mr. Wright, in the prayer of relief, in the supplemental complaint, the Government asks for arbitration, as I recall it.

Mr. Wright: That was necessary, of course, to give jurisdiction for the entry of the decree which embodied that arbitration. There is no question about that.

Judge Goddard: It is a relief asked for.

Mr. Wright: That complaint was filed simultaneously with the consent decree which included that relief, but I am telling you what our present position is, which is different from that when the complaint was filed, admittedly, in that respect.

(4166)

Now, I do not know whether your Honors want me to spend any time discussing these proposals that we have seen or not. If they are still regarded by the Court as possibilities, I will discuss them, but if this withdrawal or this substitution of the defendants is regarded as making them unacceptable to the Court, since they are unacceptable to us, I do not want to waste time on it.

Mr. Caskey: Now, Mr. Wright, let us understand it: The opinion of this Court directed that a decree be submitted embodying provisions for competitive licensing of pictures, and in accordance with that request of the Court we submitted the provisions which are set forth in section 2(7), which is a detail plan for meeting the Court's opinion. We were not privileged to submit alternatives. It was our duty to comply with the Court's request following the arguments of the friends of the Court and the interveners, and we have outlined the provisions which Mr. Seymour and Mr. Davis have submitted. Now, so far the argument has primarily gone off on arbitration, which is not the essence of the problem at all, because what we are submitting is two injunctive provisions of substance, one against discrimination in licensing runs, and the other against refusing to license any run; and

(4167)

these two injunctions are suggested as an alternative for the means which the Court formulated to deal with the problem of run, namely, competitive bidding.

Now, the argument on arbitration is a wholly different problem. We have made it perfectly clear that the arbitra-

tion proposals are a supplemental relief to be given to exhibitors and are not in any way to impair the right of the Government to proceed in the future in such manner as it may be advised.

Mr. Wright: May I address myself to the substance of these proposals?

Judge Hand: Yes.

Mr. Wright: Now, as we see both, their competitive bidding proposal and this one that has just been handed us this morning, there is nothing in either of these which would compel any one of these major defendants as theatre operators to bid against each other as a theatre operator in licensing the films of anybody. Now, the evidence in this case is clear that they have not engaged in competitive bidding among themselves for anybody's film product in the past, and there is nothing in the decree proposed by the defendants which would offer them or offer any inducement to them to engage in such competition in the future. Now, (4168)

if they are to be left in a situation where they retain the same economic interest in cooperation with each other, derived from theatre ownership that they have had in the past, it seems plain to us that strong affirmative measures must be adopted to see that such collaboration does not occur in the future. Certainly, the smaller towns and larger first run situations, where there is now no independent first run competition, or no first run opposition to them, are themselves a partial product of this past collaboration between them. Now, just so long as they are permitted to continue to do business with each other, both as theatre operators and as film distributors, it is difficult for us to see how such future collaboration may be avoided.

Now, certainly—

Judge Hand: I do not entirely get your thought, but I supposed your thought was that they had so much economic power among them that they would outbid some of these larger independents, and the stronger independents would

outbid any other independent. Now, you say they won't bid against each other, and therefore the bidding in any particular situation would be left to a single independent, and that would seem to be an advantage by a lack of competition to the independent, wouldn't it?

(4169)

Mr. Wright: I am addressing myself, if the Court please, now to the situations where there are no independents, where the situation is completely dominated by them, and as I say, in those situations what is proposed here simply does not give any promise of introducing competition that did not exist in the past.

Judge Hand: I should think that might be true in places like Cincinnati.

Mr. Wright: Well, there are a substantial number of those.

Now, if the decree that is entered here does not succeed or change the presently established pattern of distribution which is itself the product of the concerted action that was condemned by the Court, then we think the decree would be a failure by Sherman Act standards.

Now, our key proposal for compelling the major defendants to cease agreeing with each other as to how their product should be marketed, and to induce them actively to compete with each other both as distributors and exhibitors, is embodied in paragraph 8 of section 3 of our proposed decree. That is the section which contains the prohibitions primarily directed at the major defendants in the suit.

Judge Goddard: Mr. Wright, didn't you suggest yesterday that one defendant might not use the pictures of another

(4170)

major defendant?

Mr. Wright: That is the provision I am talking about. This paragraph that I have just referred to enjoins the major defendants from exhibiting films which they produce and distribute in each other's theatres for a period of ten years. Now, at the conclusion of the period it provides that

any part may come in and modify the provisions in any manner which the facts then appearing to the Court may warrant. It does not prohibit any defendant from exhibiting its own films in its own theatres or from exhibiting there the films distributed by the three minor defendants, Columbia, Universal and United Artists, or the films distributed by non-parties to this suit.

Now, the films that major defendants distribute may be exhibited either in their own theatres or in theatres not owned or controlled by one or the other major defendants.

Now, a similar proposal was briefly considered at the argument of this case. Discussion of it arose in the following manner, and I am quoting from pages 2574 and 2575 of the printed record:

"Judge Hand: Would you ask for a decree that the picture owner or distributor would only play his pictures in his own theatre or in that of the independent?
(4171)

"Mr. Wright: What kind of decree might be a substitute for divorcement if it were coupled with, of course, a freeze on theatre acquisitions, because if you had unrestricted interchange of theatres, you would have a situation such as Kansas City, where five of these people each has a first-run theatre."

That statement was incorrect. It should be four instead of five.

"I would expect that kind of provision to lead really to the divorcement of theatres, because it would take the monopoly value away from them that they now have, and if you took that away, I don't think these defendants would want them. That is, the main purpose of their structure is to use these outlets as means of preferential treatments for each other.

"Judge Hand: You think they would prefer total to partial divorcement?

"Mr. Wright: That is a matter for them, I think, to express themselves on. I do not pretend to know."

We now have express confirmation from Mr. Proskauer of my suggestion that the major defendants would rather (4172)

not have a theatre unless they are free to use it as a means of providing preferential treatment for each other's film product.

Now, at page 4009 of the transcript of Tuesday, he said:

"My people estimate that if we in our theatres, Warner Bros. in their theatres, could not buy any pictures of any one of the other majors that we would be closed 65—is that the figure?"

"A Voice: Yes.

"Mr. Proskauer: —approximately 65 per cent of the time."

Now, let us consider exactly what he told the Court when he made that statement. What he is saying in effect is simply that Warner Bros. is unwilling to keep its theatres open unless approximately 65 per cent of the playing time in those theatres is reserved for the film product of their four major co-conspirators in this case.

Now, as to who gets the remaining 35 per cent of the playing time in Warner Bros. theatres, no anonymous voice is needed to supply the necessary statistics. Quite obviously that will go to Warner's own pictures. Now, any decree of this Court which permits that situation to prevail would simply be a device for legalizing the exclusion of other people's films from their theatres by the major defendants. (4173)

As to the specific effects of our proposal to ban cross-licensing in particular situations, it is wholly unnecessary to rely on any anonymous statistics. The record in this case shows exactly what the actual first run distribution of the defendants' film product was in their theatres and the theatres

of the independents for the entire 1943-44 season in cities of more than 100,000 population. The record also shows the first run distribution of the first blocks of the major defendants' pictures released during that season as between the defendants' and independent theatres in all of the cities of over 25,000 population. We submit that this data, tabulated in our exhibits 428, 428a, and 432, furnish the best basis available to this Court for estimating what the actual effect of our proposed relief would be in the principal cities where the defendants now operate theatres. I also call your attention to a similar tabulation supplied by Loew as an appendix to its brief,—I am referring to the brief filed at the close of the evidence—and the tabulation set forth in our brief filed at the same time at pages 40 through 45. Now it should be borne in mind that in every situation any defendant's theatre would be left with the privilege to exhibit its own product free from any restrictions, plus product of the other three defendant-distributors and the three existing independent distributors, and such new distributors as might be (4174)

created in the future through the normal process of competition.

What do these tables show in terms of the number of theatres that the defendants would be required to dispose of if this proposal were put into effect. If you will take the trouble to examine them, I think it will be apparent to you that in no town in which they now operate theatres would the application of our provision result in complete divestiture of theatres by any major defendant; unless, as Mr. Proskauer suggests, they cannot keep open any theatre unless it operates primarily for the benefit of themselves and their principal co-conspirators. It is apparent from the evidence in this case that our provision in actual operation in specific situations would only deprive the defendants of a monopoly position wherever they had one. It would take none of them out of any town where any one of them is now operating, providing only that they are willing to operate there on a

competitive basis. Mr. Davis' tabulation, Appendix I of the brief for Lowe, shows that its theatre operations would have been completely unaffected during the 1943-44 season in 11 of the 36 cities tabulated. In 11 more of those cities they (4175)

would have been compelled to give up only one or two pictures. The only cities in which they would have had to surrender the entire product of one of the major defendants are Bridgeport, Canton, Cleveland, Columbus, Hartford, Memphis, New Haven, Springfield, Washington, D. C., Worcester, and Yonkers. There were no independent first run theatres in any of the 11 towns I have just named except Springfield, where the independent had only Columbia and half of Universal, Hartford, where two independents have Warner, Columbia, and half of Universal, and, Canton, where the independent had Fox, RKO, and Columbia. Loss of any privileges they have enjoyed in the past is a result regarded by the defendants as disastrous, but if their situation is compared with that of independent exhibitors, it is by no means apparent that a monopolization of film product is essential to the operation of a first run theatre. Mr. Proskauer's statement that his client cannot operate theatres without access to the product of the other four major defendants in addition to Warner's own films, presents a rather curious contrast to the independent first run theatres which existed during the 1943-44 season with the product of no other major defendant but Warner Bros. This happened in Jacksonville, Tampa, and St. Petersburg, Florida and Waterloo, Iowa, from which you will note that (4176)

situations of this character are not confined to the large cities. If you will examine these tabulations, you can see at a glance that the normal pattern for the independent first run operator is to show the picture of one or two or three of the defendants in this suit. Thus, in towns such as New Britain, Conn., and Hammond, Indiana, the independent first run theatres have only RKO, in Bangor, Maine, and Chelsea,

Massachusetts, they have only Columbia, in Clinton, Iowa, only United Artists, in York, Pennsylvania; only Fox.

In some cases, if the independent is fortunate enough to have most of the first run theatres in the town, he may have as many as four or five of the defendants' product. If he has the same number of first run theatres as the defendants, he may sometimes get a split of the defendant's pictures.

You heard testimony from one well-satisfied independent in this case who was called on behalf of the defendant Fox as to the first run situation in Richmond. Mr. Thalheimer, you will recall, operates three first run theatres there using the films of Fox, RKO, Columbia, and Universal, and from his testimony, which appears at page 1381 of the record, it also appears that Loew's first run theatre plays the product (4177)

of Loew and United Artists, and the two Wilmer & Vincent first run theatres, pooled with Loew, play the product of Paramount and Warner. Thus, Loew's theatre got along very nicely with only its own product and that of one of the minor defendants and the two other first run theatres pooled with it, got along with only two other defendants' pictures. The effect of the defendant's competitive bidding proposal would, of course, be to place in jeopardy all of the product which Thalheimer now exhibits and he would in return have an opportunity to compete with Loew only for the product of United Artists. The effect of our proposal would be to permit Loew to continue to exhibit what it now exhibits plus whatever films of Columbia, Universal, and independent product it might bid away from its competitors. Certainly as between the two proposals, ours offers a greater protection to the independent exhibitor than the defendants' proposal and it does not, by the widest stretch of the imagination, require Loew to dispose of its theatre in Richmond or any theatre in any town where it does not insist on monopolizing the film supply, whether individually or in combination with other major defendants.

A situation similar to Richmond is Louisville, which you heard described by Mr. Stites on Tuesday, Tr. 4125.

(4178)

There we find that Mary Anderson, an independent theatre, subsisting on Warner product alone. The Mary Anderson's very existence would be put in jeopardy by the defendants' proposal; while our proposal would do no more than to prevent Loew from taking the Warner product away from the Mary Anderson while at the same time permitting Loew to continue to show exactly what it shows now, that is, Loew, United Artists, and Columbia, plus whatever product of independent distributors or other minor defendants which it can secure in an open market.

(4179)

Now of course it is apparent that in situations such as Cincinnati, for example, where RKO has all of the first-run theatres, that first run monopoly would be broken because RKO could not continue to exhibit all of the defendants' product first run but would have to content itself with approximately half. This would mean that in Cincinnati RKO would either give up some of its eight first-run theatres to independents or keep all of its theatres and supply them with a greater proportion of pictures distributed by the minor defendants and independents than it has heretofore. We cannot see how either alternative could be regarded as disastrous from the standpoint of effective Sherman Act enforcement, or from the standpoint of RKO's survival as a theatre operator, unless such operation is dependent upon monopolization of film product for its success.

Of course, in any closed town or closed first-run situation, that is, where one or more of the major defendants own all of the theatres or all of the first-run theatres, the effect of our proposal would mean either the disposal by these defendants of some of those theatres or the opening of new theatres in independent hands which would play the product of the other majors. It might well result in the sale of a number of so-called move-over first-run theatres by which these defendants have been accustomed to expand their first-

(4180)

run revenue at the expense of the following runs. But in no

case would any of these major defendants be eliminated as first-run theatre operators in those towns. They would only be deprived of a dominant position there. And again we see no basis for suggesting that that kind of divestiture is either economically ruinous or inconsistent with this Court's opinion.

Judge Hand has asked me to point to the public benefits from such a result and those benefits are the advantages which are presumed to flow from operation of theatres by genuine competitors instead of by members of former members of an illegal combination. If this Court believe that such benefits are illusory, I can only say that Congress and the Supreme Court, as exemplified by its Crescent opinion, believes they are not.

Judge Hand: Of course, one of the apparent difficulties with your argument is not necessarily that they could not get along if they could not license their films to other people, but that in a great many of these towns the towns could not get along. They would not get a good variety of pictures. In other words, you are again using this argument, which is perfectly proper that you should use—I am not criticizing that—but you are using it for divorcement. Isn't that true? (4181)

Mr. Wright: I insist that I am not using it for divorce-ment. I say that it only amounts to divorcement if the defendants are unwilling to operate without a monopoly position. If they are willing to compete it amounts to only a divestiture of a few theatres where they are the dominant operators.

Judge Hand: In other words, you think it would only affect a few cities, that the people in most cities could get all of this variety.

Mr. Wright: It will affect a substantial number of cities but I submit, if the Court please, that what the people get in those cities is in no way harmed by this kind of proposal. The same number of theatres that are there now will be there. Perhaps a few more. The same number of pictures

that have been available for exhibition will be available too. What we have is a resettling of the patterns of distribution so that where you now have only major first-run exhibitors or where the independent exhibitors exist but are in a minority position, you have a situation where the product is so distributed that there is active competition among them.

Judge Hand: Yes, but these defendants have very good pictures, all of them. You all know that.

Mr. Wright: Yes.

Judge Hand: And in these towns you are talking about, (4182)

without this cross-licensing system, as you call it, they couldn't get those pictures.

Mr. Wright: I don't understand your Honor's question. You say without cross-licensing they couldn't get those pictures?

Mr. Proskauer: Of course they couldn't.

Mr. Caskey: Take New Haven, Mr. Wright. What would you do there?

Judge Hand: How could they? They may get pictures according to your idea that are just as good or even better from the minor defendants or from some others, but they couldn't get those pictures.

Mr. Wright: There is nothing in this record if the Court please that shows that the citizens of New Haven are in a worse position if some independent exhibitor should exhibit them than if one of those defendants should exhibit.

Mr. Caskey: There is no independent.

Mr. Wright: I merely point out under this provision there would be an independent first-run exhibitor in that town.

Mr. Proskauer: In other words, we have to divorce.

Judge Hand: Well, that comes to divorcement again.

Mr. Wright: It doesn't come to divorcement if the Court please, because it doesn't take them out of the theatre business (4183)

as theatre operators. It would require them in New

Haven to sell some of all of the theatres which they now own. They would not have complete control of the New Haven first-run situation. They would have independent competition.

Mr. Caskey: Created by divestiture.

Mr. Wright: I think the point at which our proposal is vulnerable is not the one suggested by the defendants, that it would bring economic ruin on them, or foreclose the kind of competition that the industry ought to have, but that it leaves each of these major defendants with a tremendous competitive advantage in any competitive situation by virtue of its own supply of film. Whether this advantage is in itself in the long run enough to prevent or frustrate any efforts to introduce competition into this industry is a serious question which this Court's decision has resolved in the negative. However, it seems to us not only consistent with that decision, but essential in the light of the decision to see that the decree that is entered here does give affirmative relief which will at least break up the pattern of non-competitive distribution that presently exists.

Judge Hand: What about this suggestion of yours which you are now urging very strongly against this kind of licensing? If the competitive bidding was eliminated which (4184)

everybody—I don't know quite what your own position is—but about everybody more or less mildly or strongly objects to—

Mr. Wright: Well, we believe in it as a method of solving controversies between people of relatively equal bargaining strength such as the independent elements of the industry. If two independents want to exhibit the same pictures on the same run which excludes the other one, I don't know any better way to settle that problem than by saying that the one who bids the most money for the run gets the picture, gets the run.

Now that, it seems to me, is implicit in any kind of system of competitive distribution that I envisage.

It is perfectly true that you run into serious administrative difficulties if you are going to have some kind of auction system and you run into serious administrative difficulties if, as is the custom, your bids or offers or rental terms are phrased in percentage terms. The difficulty there is that you never know—I assume of course that the losing bidders will be permitted to see the high bid, although the defendants' proposal does not cover that point—but suppose they look at the winning bid and they see that somebody has accepted 30 per cent when they bid 40 per cent. Now you never know whether that 30 per cent bid was the high bid until you audit (4185)

the receipt of the winner on the actual run of the picture.

Now if you are going to expose to virtually public audit the winner's receipts in this manner, I don't think these people are very long going to engage in active competition on that basis. I think then perhaps you are almost driven into some sort of a collusive scheme. And for that reason we have not attempted to do anything more with competitive bidding in our proposal than to simply state what we deem to be general principles for resolving these controversies where two or more want the same privilege which excludes the other.

I would like to address myself for a moment to our paragraph 10 of our section 2. That is the section that refers to the licensing practice, and that contains our proposal—

Judge Bright: Before you do that, I would like to ask you one question about this paragraph 8, about which you have been talking.

Mr. Wright: Yes.

Judge Bright: Now would that be fair in a situation where only one of the majors is an exhibitor?

Mr. Wright: In a situation where only one of the majors is an exhibitor? He would be unaffected if he were showing less than half of the eight majors' product. He is only af-

(4186)

fectured where he has a dominant position. Where he is exhibiting all or a majority of the available product—

that is, where he is relying on product of the other major defendants in addition to his own rather than his own product plus product of the minor defendants and independents.

Judge Bright: You don't so limit that in your Section 8.

Mr. Wright: Yes, we do so limit it. The limitation is perhaps obscure there.

Judge Bright: I can't even see it. It is more than obscure.

Mr. Wright: It is there by reason of the limitation of Section 2 of the decree, or Section 3. You will note in the first paragraph of Section 3 of the decree that that applies only to the corporations which are part of the structure of the five major defendants in the suit. That is the way the limitation is in there.

Judge Bright: Which provision is that?

Mr. Wright: At the beginning, the first paragraph of Section 3 of our proposal.

The Court: Yes.

Mr. Wright: You see the enjoining phrase—

Judge Bright: Yes.

Mr. Wright: —refers only to the corporations which are (4187) part of the five-theatre-owning defendants. It does not refer in terms at all to the minor defendants.

Judge Bright: I guess perhaps you didn't understand what I was driving at.

Mr. Wright: Perhaps not.

Judge Bright: In your Paragraph 8 of Section 3—

Mr. Wright: Yes.

Judge Bright: —you prohibit the majors from licensing other majors' films.

Mr. Wright: Right.

Judge Bright: How would that be fair in a situation where a major alone has a theatre? Why shouldn't he be permitted to use the product of the other defendants?

Mr. Wright: Well, I submit that the reason for prohibiting him from such a use is not necessarily that such use

would be in itself illegal, but that you have a past pattern of which he and the other defendants have been a part of illegal conspiracy and because of that you are justified in adapting means to permanently break up that conspiracy.

Now there is nothing startling about that kind of relief in Sherman Act cases. Almost every decree that we have that is effective does go further than merely enjoining the members of an established conspiracy from doing acts which would be legal in themselves.

And while I am on the point, I would like to clear up a couple of misstatements that were made about the Hartford-
(4188)

Empire case. That case did decree licensing on reasonable royalties for future as well as present patents. Similar relief was decreed in the National Lead case in this district. That case is on appeal. We appealed in the ground that the provision should have been royalty free—

Mr. Caskey: Mr. Wright, that was only improvements on existing patents; that was not new patents—

Mr. Wright: One of the defendants has now come in and insisted that the relief should be royalty-free licensing because there is no possible way of agreeing on a reasonable royalty.

Those cases I think have some relevance here to our provision 10(a) of our section 2. That is, our so-called sum run provision. We provide simply that each exhibitor who wants it is entitled to sum run of the pictures that these defendants release upon reasonable terms.

Mr. Caskey: Mr. Wright, may I interrupt. Have you finished with your argument on cross-licensing?

Mr. Wright: Our argument is in one piece. We offer the cross-licensing prohibition as an integral part of our decree to be considered with the provisions that I am now discussing, the sum run and our treatment of competitive bidding.

(4189)

Now, as I say, we have in our section 10(a) provided a sum run provision of that character which would require

the licensing of a run upon reasonable terms to anybody who wanted it. Now, that provision while it has an effective sound, does also present serious administrative difficulties, because the determination of what reasonable terms are in any of these situations is a rather difficult thing to get at, but in principle we think that is a sound form of relief to prevent the extreme form of discrimination; that is, where a defendant distributor may say in order to protect some favored customer, "I am not going to license you at all because I want to protect the revenue from this competitive theatre."

That is the only way I know how to answer that form of discrimination.

Now, our sub-section (b) is the only provision there which really discusses competitive distribution of runs as such, and we provide there simply that where two or more exhibitors are both seeking a run which excludes the other, that it shall go to the highest bidder.

~~Now, the last phrase that we added there—~~

Judge Bright: I was going to ask you about that. That proviso is as general as I have ever seen.
(4190)

Mr. Wright: That proviso on mature reflection I hold no brief for. I think that it is probably unnecessary in view of the provision for sum run in (a). That is, if you read (a) and (b) together I think that takes care of the rare situation where some high bidder might try to exclude by his bid a competitor from getting any later run of the picture at all. I think (a) with (b) with the proviso stricken would be workable.

Judge Bright: Well, he would do that on his own if he attempted anything like that and somebody agreed to it.

Mr. Wright: Yes. I think you may assume that the proviso in (b) is stricken, but that, of course, is with the qualification that (a) goes with (b). I think they have to be read and used together.

Now, all we did in (c), of course, was simply take the language of the Court verbatim in terms of preventing dis-

crimination, and we also simply took the Court's language verbatim in our (d) which requires the offer to theatre by theatre, and picture by picture, which seems to us is obviously the only way in which you can have a genuine competitive disposition of films.

Now, we are not at all prepared to abandon the principles of competitive distribution of runs in those situations (4191)

laid down in the Court's opinion. We think they are sound providing that they are coupled with the prohibition against cross-licensing which does not compel, or, rather, which eliminates the possibility of your independent having to compete on an auction basis, let us say, with one of these defendant's theatres, where he is faced by a situation where his competitor has an assured source of supply on whatever discriminatory terms he desires to employ, and everything that he has is open to competition. Well, we just don't think that kind of competition would be of any benefit to the non-parties to the suit. But if limited to situations where the non-parties face each other, then we think the Court's proposal, as embodied in what we have offered you, is the best statement of general principles that can be incorporated in the decree. (4192)

Unless there are some questions, I think that is the essence of our proposal as to what the Court ought to do in lieu of the competitive bidding scheme outlined in the opinion.

Judge Bright: I still do not think you have fully answered the question which I asked you about the situations where one of the major defendants was the only exhibitor in any particular community. If you exclude them from using the product of the other four majors, not only they will suffer but the public will suffer from not being permitted to see those pictures.

Mr. Wright: I take it you are not now talking about a so-called closed run situation; you are talking about an actual closed town, that is, where the town has presently no

other theatres than those operated by a major defendant, is that right?

Judge Bright: That is right.

Mr. Wright: In that situation, I would say this, that there the proposal does compel that exhibitor to either dispose of one or more of his theatres, that he now has there, to some independent, or, certainly, an independent will be induced to come in, knowing that he can get the product of four of these companies, which that single major defendant cannot do.

I think I have pointed out that we suggested, of course, (4193)

a period of adjustment before the provision went into effect. During that period we think there would be adjustments of two kinds, one, the divestiture of some theatres by these defendants; two, the formation of new distributing groups to enter the distribution field; and, three, the production of substantially more features by each of these defendants themselves. So that the precise effect of the provision when it went into effect, could not be accurately anticipated in advance of those adjustments.

Judge Goddard: How would a producer feel about going ahead and producing more pictures when his market is limited, greatly limited? He would be running into a losing business?

Mr. Wright: If you are talking about a distributor which is a part of or affiliated with one of the major defendants, he is now in the fortunate position of having an assured market and would still have an assured market for his pictures in his own theatres.

It is perfectly true that he would have to go out and seek new outlets in many situations where he now licenses another major defendant, but I am pointing out that the outlets are there. They are in independent hands.

(4194)

Judge Proskauer said yesterday—

Judge Goddard: What facts have you to support that? Don't you suppose that they are placing their pictures with every theatre they possibly can now?

Mr. Wright: Obviously, in first run situations there is an exclusionary element in the placement. You make a selection for first-run situations and, to a lesser extent on subsequent runs, between a number of possible outlets. I am simply saying you would have to select other outlets than those that they now have in a number of situations.

Mr. Proskauer said yesterday, as far as Warner was concerned, the money they made from distribution was made by selling to 15,000 independent exhibitors anyway; that is where the profit in the distribution end of the business came from.

The defendants throughout the trial——

Mr. Proskauer: Why don't you be careful in your statements?

Mr. Wright: (Continuing)—offered statistics to show that, apparently, they licensed each other's theatres simply as some form of public service. All we are telling them is to leave the public service to each other and go out and make some more money by selling some more independent accounts. I don't think that is a particularly harsh treatment as far as they are concerned.

(4195)

Judge Bright: It seems to me that the net result of the situation that I mentioned, in which you say you exclude the use of the product of the other defendants——

Mr. Wright: Other major defendants.

Judge Bright: (Continuing)—the other major defendants, would be to say to the defendant who was operating, "You have a monopoly in that town. You had better get somebody else to enjoy that monopoly."

Mr. Wright: It does not give anyone else a monopoly. All it does, it is saying, "You have a monopoly in the town. We are going to take the monopoly away from you. Someone goes in against you," but it leaves him in the town so that neither he nor the newcomer has the town.

I submitted in some of the memoranda that we sent to the Court before these hearings the opinion of Judge Knight in the Schine case. In the small towns, he handled that problem in that suit, those are mostly towns from five to 25 thousand, by ordering Schine to sell a theatre or theatres of his selection in those towns to an independent competitor in order to create actual competition in those towns and destroy a monopoly position.

The monopoly positions that are involved here are, of course, infinitely more significant in terms of industry control than any of those little situations that were involved in (4196)

the Schine case, and I submit that the kind of relief that is being proposed here is less drastic, if you compare the scale of the violations and the scale of defendant's operations, than the kind of relief to which both Schine and Crescent have been subjected.

Judge Bright: I suppose a fair answer to that is that in the Schine case you had proof of overt acts by Schine, by which he was driving out competition, where there is no such proof available in this case.

Mr. Wright: Oh, now, if the Court please, how can you better dispose of your competitors than by the maintenance of a system by which you jointly control preferential runs and by which you maintain your ultimate price of the product? And that there is exclusion, partial exclusion, is implicit in any system of runs and clearances that you could operate and in the system that was operated here. The obvious effect of it, as the Court pointed out in the opinion in the first-run situations, is to concentrate the available revenue in the hands of the prior run operator by taking it away from those on the lower levels. I do not see how there is any basis for assuming that power so exercised by these defendants in this case is any less harmful than the kind of power that was exercised in the Schine and Crescent cases. (4197)

It seems to me, essentially, that is the real difference between ourselves and the defendants, that is, we presented the

case and argued the case in terms of market control, actual power to dominate the market, and I think that if the recent decisions of the Supreme Court mean anything, they mean that power is the crux of Sherman Act cases, and that your relief and the effectiveness of your relief has to be tested by what it does to the defendant's power to continue a control of the market when they have been found to have maintained by illegal means in the past.

Judge Hand: I have an idea: Of course, you are entitled to answer these things Mr. Wright has said, but we can go on here while we, according to the old Philadelphia song, are sitting by the winding creeks holding our breath for weeks and weeks listening to this eternal argument. I do not feel inclined to do it very, very much longer. I think we will have to get down to these main issues. The one Mr. Wright has been discussing is a very main issue, and it certainly calls for discussion as to whether we should or should not adopt it. After we have got rid of that point and some of these other main issues, we will have to sit down, when we can get any time to do it, and I get over my conference with the Circuit Court of Appeals, and make our decision in final form. I do not think we can talk here forever, that is all.

(4198)

Mr. Proskauer: I have tried to accommodate myself to that admonition.

Judge Hand: You always do. You are always brief. We really cannot, however, go on in this horrible, horrible pastime of settling decrees, which has always been the most obnoxious thing on earth that I have ever had to do since I have been on the bench. We cannot go on forever with that.

Mr. Proskauer: I will begin then, your Honor—

Judge Hand: It is very important, of course, to the parties and to the situation, and we have got to define our terms and define our situations. We cannot prolong this forever.

Mr. Proskauer: I will begin by saying that my embarrassment is that, no matter what we begin to discuss, and I am not saying this in criticism of Mr. Wright, the answer to it is

not a discussion of the thing that is sub judice at the moment, it is a recurral to those things which have already been threshed out.

Yesterday I supposed that between Mr. Davis and myself and Mr. Wright we had thoroughly discussed this curious situation of enjoining what he called cross-licensing, which is not cross-licensing at all in the technical sense, and I had occasion then to take your Honor's opinion and to point out exactly what we had been found guilty of and what we had been acquitted of. Now today I get an argument that com- (4198a)

pletely ignores that, that continues to talk about monopolization, that your Honors expressly acquitted us of; that treats the major defendants' buying power as a consolidated thing and that harks back always to what Mr. Wright, really, when you analyze what he said, frankly admits is a coercive divorcement.

(4199)

This notion that if there are three theatres in a town—I am going a little further than Judge Bright's question—let us take a situation where there are three theatres in the town, all owned by major defendants here, but three competing theatres; and he says that those three theatres have got to close because they can't get each other's pictures.

Mr. Wright: I said nothing of the sort. That is what you said.

Mr. Proskauer: Well, I did say it. I say that practically that means they have got to close or be sold, or something, and I am not going to bandy words about it, but what I am trying to say is that it is perfectly apparent and clear over the somantics that Mr. Wright is trying to inject in this discussion, and that is that these people could not see the pictures in those cities.

Now, I advanced the argument yesterday, and I believe that it found some favor with the Court, that the injunctive provisions of this decree were, as I put it, punishment sufficiently deterrent to fit the particular crimes of which we

have been found guilty. I do not want to go over that argument all again. I sympathize very deeply with what Judge Hanft has said. May I now incorporate it by reference here (4200)

and ask your Honors in considering what Mr. Wright has said today, just read what Mr. Davis and I said yesterday in answer to him when he was saying exactly the same thing that he said today, and now revised in a different form with the same assumptions.

Essentially this talk about our not showing one another's pictures is an enforced divorce which your Honors have held was totally unavailing and totally unnecessary, and if you wish to go into the details of those figures that he has been raising, my friend Mr. Caskey here is ready to take it up and give your Honors a very good talk on it. If you do not want to go into it, we are perfectly willing to let it go.

Now, I am not going to defend myself against certain misquotations here. The 65 per cent figure that I used simply meant that our theatres in certain large areas would be dark that part of the time that we could not get other major product. It did not mean at all that we were taking 65 per cent of the product, because it related only to small areas and special situations. And so I could go through all he said, straightening out these misquotations.

But now I want to follow your Honor's suggestion of coming to what I think is the heart of this thing. The cross- (4201)

licensing feature we think we disposed of yesterday to your Honor's satisfaction. I agree with Mr. Wright that the purpose of a decree is to cure the evil complained of. Now, in what postures are we here? You wrote, your Honors, that you wanted this competitive bidding. We have not asked you to exclude it from this decree. I wish to make clear our exact position. When severe criticism of it was made by independents or by exhibitors, we undertook to expand the injunctive part of your decree over and beyond something that was not in your opinion, and, namely, to subject ourselves to

injunction with respect to run as well as clearance. I emphasize that. That is the essence of Mr. Seymour's proposal. We are not asking you to enjoin us in this respect. We are suggesting to you that if in your wisdom you believe that the competitive system has too many difficulties, that if you add to the injunctive provisions that are already in this decree the injunctive provisions that Mr. Seymour has suggested, you have effectively created a machinery to destroy the four evils that we have been found guilty of and which I enumerated yesterday. You will kill them if you do that, in our judgment. And I do not want the significance of what has (4202)

been done here to take either of two aspects, either that we are here trying to get away from your Honors' opinion with respect to competitive bidding—because we are not. If that is what you want, we have suggested clauses to implement it. If you decide to change your minds on it, we give you this suggestion as an additional harness and rein on us that will, we believe, effectuate the purposes of your opinion.

Now, a great deal has been said here about arbitration. I start out my discussion about arbitration by a reference to your Honors' opinion, "Even though we may regard it as desirable that such a system in view of its demonstrated usefulness should be continued in aid of the decree which we propose to direct."

That is what your Honors have said about it. There are two opinions about arbitration among certain groups of exhibitors. All those who have lost arbitration think it is a terrible system, and all those who have won them think it is great, and that is the foundation, I believe, of Judge Arnold's embarrassment in getting conflicting views from various members of his organization; but this system which was set up under Judge Goddard's guidance has justified the encomium that you put on it, which I think no fairminded student of this problem can gainsay.

(4203)

Now, Mr. Wright refers to it as our arbitration system financed by us. That is one of the most—I won't say "in-

decent"; I am looking for a less harsh word than that—I will just say unfair insinuations I have ever heard from counsel in a courtroom. How is it our arbitration system, excepting that we pay for it under the direction of the Court and our consent? Did we appoint a single arbitrator? Every member of the Appeals Board was appointed by Judge Goddard, who was so meticulous about it that he would not even take suggestions from anybody. The panels are chosen by the American Arbitration Association. What does counsel mean by coming in here with the dirty innuendo that that arbitration system is our arbitration system? It is a system set up, to use your language, in aid of the decree, and I propose now to demonstrate to a mathematical certainty that you have got a right to put it in this decree despite the turn-about of the Government.

When it comes to the implementation of it, let me say that the rules of arbitration of course have to meet the approval of this Court just as they had to meet Judge Goddard's approval under the consent decree. It is impossible to make any man arbitrate. You can't force him into this system either by making it a part of a decree or otherwise. (4204)

And in the rare and almost unheard of case where all parties did not gladly come in and consent to arbitration, arbitration would be abortive, and the system would not help with respect to a situation where A and B claim clearance or run, and A wanted to arbitrate and B did not, you would have to rely on the injunctive provisions of this decree, and we would have to decide at our peril, and we could not invoke arbitration whether it was in the decree or out of the decree. But we are not going to cast this system into the ashcan because of that exceptional case. We are going to think of the 400-odd cases to which Judge Goddard referred where everybody was ready to come in and arbitrate it, and we are going to think of the posture that this Court would be in if it does not create such a machinery in aid of this decree where anybody who feels himself aggrieved under this, he has got to go down to the Attorney General and make a motion.

to punish somebody for contempt because he did not think somebody restrained from discriminating in giving someone a run; and I am saying to your Honors with all the earnestness I possess as an officer of this court that for your own protection in the administration of this decree; it is vital that you preserve an arbitration system properly and de-

(4205)
cently set up under your own supervision, we consent to pay for it.

Now, I propose, as I said, to demonstrate to a mathematical certainty that you have got the power to do it, and that argument divides itself as a legal argument into two heads. First you have got the power to do it, irrespective of the consent decree; you have got a right to impose upon us our consent to do anything that you think is helpful in carrying out your decree. You have got an absolute right to say to us, "This Court insists that you set up an arbitration system or else we will divorce or give cross-licensing injunctions, or any other thing."
(4206).

If you have got a right to impose it on us, certainly the fact that we are not only ready but glad to have it imposed on us in our desire to bring peace into this industry, does not affect your power to bring peace into this industry, does not affect your power to impose it on us. And when Mr. Wright talks about the bill in this case, to which Judge Goddard referred, in anticipating that reference I had run off here copies of the decretal prayer of the plaintiff that a "nation-wide system of impartial arbitration tribunals or such other means of enforcement as the Court may deem proper be established pursuant to the final decree of this Court in order to secure adequate enforcement of whatever general and nation-wide prohibition of illegal practices may be contained therein."

Judge Hand: Is that the amended complaint?

Mr. Proskauer: That is the complaint upon which this case is now before your Honors, the supplemental and amended complaint.

And while Mr. Wright has got a right just as a mere matter of power to change his mind, though he signed this together with the then distinguished Attorney General, Judge Arnold, he has got a right to change his mind, but that is the pleading we are here under.

Mr. Wright: May I make one point clear right now? If this Court had intimated in its opinion that it could or (4207)

would impose a system of that kind on these defendants, not make it subject to their consent, we certainly would have presented you one, and if that is the position of the Court now, that is something that certainly was not revealed by the opinion. The opinion said that it must be conditioned upon the consent of the defendants.

Now I don't see much point in arguing the matter now as though you had said "it doesn't have to be conditioned upon the consent of the parties. We will impose such an arbitration system."

Mr. Proskauer: As usual, I find myself in a complete haze as to what the distinguished Assistant Attorney General is trying to say.

We proposed and served on him a draft decree calling for certain arbitral provisions. We got back from him a proposal that the whole arbitration system be scrapped. Now I don't know what he is talking about, and I don't want to waste any more time bandying words with him. I am here to ask your Honors to preserve this arbitration system and I am arguing the point that you have the power to do it. You have the power to do it because the Government itself has alleged that it is an appropriate method of carrying out a decree and because the Government itself has prayed for it, and even if the Government had not, you have got a right (4208)

to impose it on us, as I said, as an efficient means of carrying out the purposes of the decree.

Now I don't know what he wants changed in the present system. He has not honored us with his confidence in that

respect. All we got from him, as I say, was a curt statement that the arbitration system would be liquidated.

But there is another point—

Mr. Wright: That statement is untrue.

Mr. Proskauer: Well, I don't propose to argue that with you, Mr. Wright. I propose to finish my argument to your Honors.

This consent decree is not a piece of waste paper. I have read opinions in two cases—the Swift case and the Glass case I think it was—the Chrysler case—where the Supreme Court considered the power of the court to amend the consent decree. I have never heard of any litigation which questioned the power of a court to preserve so much of a consent decree as they thought was proper. There isn't a case like that in the books. That consent decree was a judgment of this court. I am not now talking about it as a contract or any of those controversial things which are discussed in those two opinions. I am taking it at its face. It is a judgment of this court. And if you discard every- (4209)

thing else I have said up to this point, I would say that your Honors had the power to reserve what that judgment adjudicated, namely, the establishment of an arbitration system. It is in your wisdom to decide whether or not to do it, whether it is an appropriate instrument; but you have the power to do it. After the Government consented to that judgment there isn't the slightest doubt.

Now I want to say one more thing and then I shall have finished. Judge Hand asked, as I understand it, a question that raised the general subject of whether you could not do this arbitration thing outside of a decree of the court. We can't. It raises a question that is too serious legally to be thought of, namely, whether, if we go out and try to agree with one another and with exhibitors to a general system of arbitration, we are not bringing ourselves within the condemnation of those sections similar to what your Honors have condemned as a general system of clearance, and I for

one would not dream of permitting a client to enter into such a system, however beneficial it was, unless this Court ordered it.

Now I see Mr. Wright chuckling, and I know his argument, I have heard it before. It is the absurd claim of the plaintiff in the St. Louis case that the court has authorized a violation of the Sherman Law. And despite his glee I (4210)

will meet it head on.

What may be a violation of the Sherman Law if it is a voluntary agreement among individuals—and I don't say that this is or is not; I am just saying I am not going to take the chance in the present temper of the Attorney General's office—"Carthage delenda est," if I may quote.

Mr. Davis: It was not original with me.

Mr. Proskauer: It was most original to you. We can't do that. But your Honors can compel us to consent to a system. If we were thwarting the Court and thwarting the Attorney General's office voluntarily, it might be the subject of denunciation from such purists as now seek to enforce the Sherman Law. It does not follow at all from that that your Honors have not the perfect right when the Government prayed for it, when the Government prayed for it, to set up exactly what the Government prayed for.

And I again say to your Honors in all deep earnestness that whatever else you may do with this decree, if you want to keep this Court free from continuity of applications, from embarrassment in the decision of all kinds of controversial questions, and give the independent, if they choose to seek it, a quick, cheap and efficient method of settling these controversies, keep in those provisions for arbitration.

(4211)

Judge Hand: Now, Mr. Caskey, it was said that you have some observations about this matter which the Government calls cross-licensing, which you wish to have put in the decree.

Mr. Caskey: The observations that I have to make are simply to call your Honors' attention to the state of the record upon which any judgment would have to be entered. There is in evidence one exhibit which shows the distribution of the first-run of the product among all of the first-run theatres in the 92 cities in the United States that have a population of 100,000 or more.

Judge Hand: You had better refer to that by exhibit number.

Mr. Caskey: 428 is my recollection.

Mr. Wright: Eight.

Judge Hand: And whose exhibit was it?

Mr. Caskey: That is Government's Exhibit 428. That shows with respect to each theatre which operated on a first-run basis the product that it played during the 1943-1944 season.

There is also in evidence—and I will supply the stenographer with the exhibit numbers—answers to interrogatories by each of the eight defendants which show the theatres which operated on a first-run basis in cities of a population of 25,000 or more.

(4212)

Mr. Wright: I think that is 432.

Mr. Caskey: That is right—well, that is your summary.

Mr. Wright: Yes, that is the tabulation from these interrogatory answers.

Mr. Caskey: That is right. That shows the distribution of the first block of pictures released by each of the companies; that is to say, taking Twentieth Century-Fox, which shows where the first block, which was three pictures, played first-run in the cities of 25,000 or more.

There is no evidence as to the product used by any affiliated theatres which operated on other than first-run. There is no evidence—

Mr. Wright: I think that is in error. There are interrogatory answers as to the larger cities, you will recall, which cover the first five runs in the largest, the first four in the next largest, and so on.

Mr. Caskey: That is for 1936-1937 in the old case.

Mr. Wright: No, the 1943-1944 answers. They cover the first five runs in the largest, the first four in the next largest, the first three in the next largest, and so on down, so they do show the extent of the defendants' control.
(4213).

Mr. Caskey: We can't agree on anything. That is, as far as I recall it, with respect to one picture.

Mr. Wright: That is right, with respect to one picture.

Mr. Caskey: With respect to one sample picture and for that purpose that proved nothing.

Mr. Wright: That selection of a sample picture was made on the theory that it would be representative of the defendant's products.

Mr. Caskey: I have to dispute that, I am sorry. It was the picture which grossed the most. It was the picture which had the widest distribution.

Now I repeat, that except for this there is no evidence as to what product any affiliated theatre played when it operated other than first-run, or when it played in a city, or any other run if the city was smaller than 25,000. Now that is from the exhibition end.

Now from the distribution end there are in evidence exhibits and tabulations which are referred to in the Government's brief showing the percentage of revenue which each of the defendants received from each of the affiliated theatres, that is to say, speaking very generally, the proof showed the percentage of Columbia's revenue which it received—
(4213-A)

not Columbia's, because that would be inapposite—but Twentieth Century, the revenue which it receives from Paramount, Warners, R.K.O., Loew's theatres, its own theatres, and the independents. That would show the per-
(4214)

centage of revenue which it would lose under this ban against so-called cross-licensing, unless, of course, the theatres were sold to someone else and the revenue recouped in that manner.

Judge Hand: This was first-run revenue?

Mr. Caskey: No, the latter referred to the total national revenue that the distributors received.

Mr. Seymour: Could I just add a word upon the subject of cross-licensing, as the Government calls it? It seems to me a most fantastic proposal in favor of restoring competition to take out of competition by court decree those most able, or among those most able to compete. The proposal is a proposal that the distributors should be denied the opportunity to have their product sought by most of the 3,000 best theatres in the United States. And the proposal is, to the defendants as exhibitors, that most of those theatres shall be denied an opportunity to seek or compete for product, and that is all based upon the premise which your Honors expressly rejected, that there was monopolization between these companies in their mutual dealings; and I submit that the proposal is almost too fantastic to merit all the consideration that your Honors have so patiently given to it.

Mr. David: Will your Honors permit me just a word, not by way of argument, but to set the record straight?

(4215)

I dislike this phrase "cross-licensing" in this connection. Cross-licensing involves, by its very use, the suggestion of mutuality. If there is anything in this case which has been proven up to the hilt by every witness it is that there is no reciprocal obligation on the part of any licensee of one of the major's films to reciprocate by a similar exchange of business or, if you choose, a favor.

There is nothing in the record which can possibly support the assertion, much less indicate, that there is a system of reciprocal favoritism.

I much prefer, if we can, to get the phrase out of our minds and that we should drop the phrase cross-licensing and speak, if you please, of inter-defendant licensing. That is what it is. It is not cross-licensing in any sense.

I remember, when the Government started with its charts and exhibits, it spoke of diagonal-licensing, and that, of

course, depended entirely upon the method by which the chart was constructed, and those diagonals did appear. I would rather have diagonal-licensing than cross-licensing.

We were told, when this suggestion came forward from the Government, that it would not hurt us; that, after all, (4216)

we could keep our theatres alight with our own films and with the films of the minors; and we are now told quite frankly this morning, the mask is thrown off, we are told that the real effect of it will be that some of our theatres will be left dark, and the economic consequence of that will be the Government will attain its primary objective and we will sell the theatres rather than keep a caretaker there with no audience to attend it.

In other words, what the Government is proposing is that, instead of using the guillotine on it, it prefers to use slow poison, and whatever satisfaction that evinced I suppose we should be grateful for.

But there is just one aspect of this thing which I do not think anybody has alluded to on this Governmental program. Suppose they were all driven out of the use of each other's films, and when I say all I am speaking, of course, of the majors at the table, and we are all going to be supplied by the minors' films. Has it occurred to the Government that by throwing all that new weight upon the films of the minors, there won't be enough of the minors' films to go around?

If the minors are to fill up the deficiencies in our theatres, we are not going to be helped if we have all got to resort to that common pool and that common pool alone, which, of itself, mathematically, I think, demonstrates that the (4217)

Government cannot have it both ways. It cannot invite us to keep our theatres open from that source and then say, of course, with the demand upon that source, that we can possibly keep our theatres open by using it.

From every angle, if your Honors please, at which you view it, it is a perfectly absurd suggestion. It seems to bear

no resemblance whatever to anything of fact or to anything of law.

And may I say just this about the Sherman Law and about the apparent attitude of the Government? It is very evident that this motion picture scene is not a plateau or a tabletop. It is a landscape with hills and with valleys in it, and some on the hilltops get more sunlight than those who are located down in the lower valleys. It seems to be the theory of the government that on that landscape you can take an iron sheet, called the Sherman Law, and press it down so that when you lift it the landscape will be a level plateau. The Sherman Law does not contemplate that, no law has ever contemplated it, and there is not now, there never has been, and the wit of man will never devise a statute under which one dollar will do the work of ten. Those inequalities will persist as long as the activities of men differ, as long as their capacities differ, and as long as their earnings differ. And the Sherman Law is not directed to the creation of a statute (4218)

of absolute equality at all. In essence the Sherman Law, and it is often spoken of as the law of the jungle—I do not think it is the law of the jungle, I think it is the law of nature—in essence the Sherman Law is that the race shall be to the swift and the battle to the strong, and no artificial impediments shall be put in their way.

Mr. Jackson: May I ask your Honor whether you would care to hear the attitude of the independent exhibitors represented by Colonel Barton and myself with respect to the proposal made this morning?

Judge Hand: Yes.

Mr. Jackson: I will be very brief. In the first place, in order that there be no misunderstanding either with the Court or with the two thousand odd exhibitors we represent, I should like to say that our instructions were to come here, to appear, to seek intervention, if the Court would permit it, and, finally, to oppose in every possible way the imposition of competitive bidding, or, as it has been called, auction sales.

We are not authorized and cannot part from those instructions. We still seek intervention and we still ask the Court to throw out competitive bidding for the reasons which we have given and which I will not repeat except to say that we regard it as creating a situation where two or more ex-

(4219) hibitors will compete among themselves as to which shall pay the most money to the distributors. And we believe that the other relief which your Honors have in your decree is sufficient to cure the evils which you have found to exist.

Yesterday we were asked to consider your proposal which Mr. Seymour has presented and we proceeded to consider it and get in touch with as many of these exhibitors as we could reach in person or by telephone. Among those whom we reached, only two have opposed it. They have said that they want neither competitive bidding nor arbitration. They want a free, open and unrestricted market. The remainder of those, and they are not too many, but all we could reach, have taken the position that this proposal is far less objectionable than competitive bidding, and they would, I think, much prefer to see it go into effect if the sale of features, of pictures, is to be the subject of your Honors' decree.

I think that constitutes our position. Perhaps your Honors would hear Colonel Barton a moment, if he has something to add or anything to correct.

Mr. Barton: May it please the Court, I do not think there is much I can add to Mr. Jackson's statement, except perhaps I might briefly restate our position and enlarge upon our reasons, because I have been in closer touch with our

(4220) clients, who are scattered from Virginia to Texas, and to Arkansas, than has Mr. Jackson.

They fell, from their experience with the practices of the defendants, which the Court disapproves, that the dozen or so remedial actions directed by the Court will effect the desired results without competitive bidding as outlined by the Court, which is a repetition of the argument I have already made. My clients feel the losses which will flow from the

competitive bidding direction are far greater than any possible benefits which may accrue for the reasons previously stated. We have listened with a great interest to Mr. Davis's plausible sounding presentation of the major producers' version of competitive bidding. In our opinion it does not overcome any of the administrative difficulties which I pointed out and will inflict even greater harm on the exhibitors than we had previously anticipated because it makes the defendants the legislature, the judge, the jury, and, finally, the sheriff, to transfer more money from the exhibitors' pocket-books to the treasuries of the defendants.

(4221)

Our reiterated plea is that competitive bidding be eliminated from the decree, and, within the limitations of, or the orbit established by the other provisions of the opinion, that the exhibitors be permitted freely to enter and trade with the defendants. We still have some of the faith of our fathers in free enterprise.

In respect to the proposal advanced by the defendants as a substitute for the competitive bidding proposal, we are most desirous of assisting the Court by a definite expression of our views. As Mr. Jackson has said, we have had difficulty ascertaining our clients' views because of the large territory in which they live. Many we have not reached. Two, as he said, are very strongly opposed to the proposal, especially the arbitration provisions. To the extent we have been able to ascertain our clients' opinions, it may be summarized as follows: They are unalterably opposed to competitive bidding as outlined by the Court. They believe that the other remedies which the Court has directed are adequate to cure the ills of which complaint is made without implementing them, these remedies, by competitive bidding.

But if the Court is finally of the opinion that these remedies must be implemented, then our clients feel that the principles of the substitute proposal are much to be preferred to competitive bidding as directed by the Court. I

(4222)

used the word "principles" because we have not had time or opportunity to go over the details of the proposal with our clients as fully as we should like to do.

Mr. Arnold: In that connection, if the Court please, may I make a request which I have been asked to make on behalf of my client: In the event that the Court should decide on an arbitration system, we would be greatly indebted to the Court if before formulating those findings, our clients should have an opportunity to see them.

Mr. Williams: If the Court please, in so far as my client, the Southern California Theatre Owners Association is concerned, I previously have not had an opportunity to take up and discuss with them the substitute proposal, but I think in essence I can adopt for them what Judge Arnold has said about the American Theatres Association, and I think that fairly represents our position at this time.

Mr. Raftery: May it please the Court, after all the reference to the minors, may I state that all this discussion today brings us back to the proposition that we would like on behalf of United Artists the privilege of submitting a separate decree. We do not like the Government's decree.
(4223)

We appreciate the great kindness in suggesting this diagonal licensing, if I may not be offensive to Mr. Davis, because we realize the great competitive advantage we will have in dealing with the theatres of the big five in the future. We do not like what has been submitted by the majors, and I think I outlined we do not like some of the conclusions of the learned Court. We felt and we argued strenuously, I believe, during the trial that we should, instead of being over here in the bleachers, we should have been outside the fence at all times. We feel there are certain specific findings of fact that as regards each of us separately that make us perhaps no better but at least different from our brethren at this table. We feel to throw us into a decree where we have so many separate problems, that only some of these folks have, —and we did not submit a decree because we wanted to ask

your permission first; we only submitted findings and a brief to support the findings. For example, the definition of a feature picture which Mr. Wright says is anything that is 4000 feet or longer, we think has got to be supplemented because you have in this industry things known as Westerns, which some of us handle, and I do not mean "The Outlaw"; we have Westerns which were sold in series, the only way (4224)

you could sell them, and that is the only way the exhibitors want to buy it, and we think there should be a specific exemption in this decree that would cover Westerns as well as shorts.

You heard Mr. Isseks yesterday or the day before talk about road shows. My company has roadshown perhaps as many pictures as any other company in this industry, perhaps more. In the old days of the company, Mr. Fairbanks and Miss Pickford and Griffith generally road-showed every important picture they had. Vanguard, one of our producers, has its *Duel In the Sun*, and wants us to road show that. We think that the Government could aptly sit down with us and work out an exemption on road shows and an exemption on Westerns, because they are not the ordinary supply, the ordinary commodity of commerce that is involved in this litigation. We would like to sit down with the Government, if possible, and with your Honors at some time and consider the findings, our proposals.

When I wrote that United Artists did not fix prices, as your Honors found in your general opinion—I knew I did not brief it before because it escaped my attention; because I believed, perhaps foolishly, that your Honors would find that in view of the fact that there was no sale of tangible (4225)

property involved in this business, that price-fixing did not apply. I think your Honors made the first finding of this character in all the litigation on price-fixing, that there is something illegal in this type of transaction where you fix an admission price in a theatre. There has never been a

finding in the books, so far as I can find, and I think I have exhausted every authority, where price-fixing in the manner set out in this trial has been held illegal per se by any court. In fact, the basis of every decision where price-fixing has been found illegal is where the seller either parted with the title, or as they did in the Victor case, pretended to make a lease or license when in reality they made a sale.

In that United Artists license agreement of October 1941, I examined every record that was put in, and United Artists did not put in a provision that the exhibitor must charge X dollars or X cents admission to its theatre. The simple provision was that the exhibitor warranted that the admission price at his theatre was blank cents. There was no penalty provision; there was no agreement that he must charge it for the exhibition of that picture; it was a mere warrant. And we ask therefore for the privilege of having our findings (4226)

passed on individually as they are submitted, and that we be permitted to submit a separate decree, because I look on the price-fixing thing as perhaps the most serious thing so far as the independent distributor is concerned. We depend on our revenue on percentage engagements for all important pictures. We can't accept the suggestion of flat rentals. If we want to go back to the flat rental days in this business, then we might as well give up as far as quality is concerned.

Judge Hand: Had you no provisions in any of your licenses as to price maintenance?

Mr. Raftery: Prior to October 1941 there were provisions in some of the license agreements that are in that the exhibitor agreed to charge for that particular picture. There was no penalty if he did not. From October 1941 every printed contract that Mr. Wright has put in evidence has the mere warranty provision, just as I put it in the proposal, with no penalty—

Mr. Wright: Is it your position that there are no penalties for breach of the warranty or breach of the contract?

Mr. Raftery: Yes.

Mr. Wright: In that I think Mr. Raftery is in error.
(4227)

Judge Hand: What?

Mr. Wright: In that I think Mr. Raftery is in error.

Mr. Raftery: Did you produce a witness to show that we ever exacted a penalty or ever tried to stop an exhibition?

Mr. Wright: I believe if your Honors will examine the agreements he refers to you will find that there are penalties prescribed not for failure to maintain admission prices as such but for breach of the agreement.

Mr. Raftery: There is nothing in the record that we have ever at any time tried to enforce any of those old ones; but from October 1941—and we are looking at the present, not at the past—there is no provision fixing admissions in any one of those contracts.

Now we come to the question of run and clearance. We have asked for specific penalties on those. I am not going to argue that now. We respectfully ask that the Court give consideration to Road Show, to a definition of Features.

I know the independent exhibitors. I know the whole industry will agree that Westerns deserve a special category. I feel that road shows are very important because they do not come frequently, but when they do come they are an
(4228)

emergency type of picture.

I understand Mr. Wright stated in answer to Mr. Isseks that everything was cured as regards *Duel In The Sun* because he said he heard from someone that Raftery was going to appeal on the price-fixing. That does not cure it. Let us assume that we do decide to appeal on the price-fixing. I feel we will have to, if your Honors adopt this new rule that price-fixing per se is illegal in the manner in which we do it in the motion picture business; I think for the preservation of independent production that we have got to appeal on that.

As regards our other problems—and I have had specific findings submitted—we distribute for about 23 independent

producers. Each of them separately by contract control our general sales policy on each picture. They are the ultimate to say whether we take an agreement or do not take an agreement. I think competitive bidding is one of the loveliest-sounding things that I have ever heard in my 27 years in the industry. I have not the great sympathy for Judge Arnold's clients or Colonel Barton's; I have never known an exhibitor yet who could not take care of himself when he bought pictures.

(4229)

I told your Honors at the opening of the trial we tried to get everything we could get, and they tried to pay us as little as possible, and the injection of competitive bidding is not going to change that. I do not believe that any two clients, whether they are independent or affiliated, are going to break down and start bidding furiously to get any picture we have got. They are going to find a way to control competitive bidding if it is put in, and they will control it by not bidding. I believe that is the only practical thing it will come to.

However, I have no opinion on whether it should be in the decree or out of the decree. I do not want it in any decree against us, and that is the reason I am asking for a separate decree. I want to enter a decree or a proposed decree where there are as few injunctive provisions against us as possible, and no mandatory provisions about what we have to do in the future.

Judge Hand: Why, you just want a decree in your favor.

Mr. Raftery: I asked for that in the beginning.

Judge Hand: I know that, but that is not a settlement of the decree—

Mr. Raftery: I know—

(4230)

Judge Hand: Now, wait a minute. That is the trouble with most of these attempts to settle a decision of the Court. They come back and really put in there what they would have put in if there had been no decision—

Mr. Proskauer: I am not guilty.

Judge Hand: Then I do not see that that serves any purpose; but if you want to put in some kind of a proposed decree with regard to yourself or your clients that meets in general with our decision, why, go ahead. I do not see the difference between what you propose as far as preservation of your rights is concerned and your situation now.

Mr. Raftery: Well, it is a little more than that, your Honor. I think that I am fair in asking your Honors, if I have pointed out to you in these proposed findings what I believe are errors that you have made in regard to United Artists' position—I feel I am fair in asking you to reconsider, for example, on the price-fixing proposition; and if the undisputed evidence is that there has not been a single price-fixing provision in a United Artists contract since October 1941, why is there any necessity of any injunctive provision on that point against a defendant like United Artists? Why should we be put in the same position as the other seven defendants?

(4231)

Judge Goddard: You are only speaking of United Artists—

Mr. Raftery: I am only speaking of United Artists on that.

Now, as regards the Road Show provisions and Westerns, there has been no evidence of any kind or character put into this record except what was advanced by the amicus curiae the other day on what road shows really are. All we have is a definition. We strongly urge that road shows be omitted by specific direction; because we do not think it is going to increase the flow of interstate commerce one way or another. As regards any other definition of features I am willing to accept Mr. Wright's conclusion that 4000 feet—I think he is a little low on it; I think 5000 would be a little fairer—as a definition of what constitutes a feature film.

I do think that we could accomplish a lot if we eliminate road shows and eliminate that and straighten out our facts on United Artists in connection with the price-fixing, and I

"intend to submit a decree which is not, as you put it, a victory—I intend to submit a decree with the proper ancillary provisions in based upon your decision, not on my wishful thinking.

Judge Hand: Well, you can do that.

Now we will adjourn until a quarter past two.

(Recess to 2:15 p.m.)

AFTERNOON SESSION

Mr. Seymour: May it please the Court, I have been asked to carry along now with the discussion of the yellow-covered document, if that is agreeable to your Honors.

I am going to pick it up with section III on page 13 because I think the other intermediate sections, which we haven't discussed, are clear enough on the document without any separate discussion. Involves arbitration and other things which we talked about generally.

Mr. Cooke: If it please the Court, before we proceed to section III, as Mr. Seymour talks about, which concerns the major defendants only, on which I will have nothing to say, might I just say one brief word on the clearance provision in arbitration in connection therewith? It is this, that we feel that the clearance provision on page 4, proposed by the Government, that is, that we cannot grant any clearance (4233)

against theatres in substantial competition with a theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted, is in direct conflict with the Interstate Circuit case as construed by the Supreme Court itself in one sentence in the Ethyl Gasoline case, in which it said that the restrictions in the Interstate Circuit case were imposed "for the exploitation or promotion of a business not embraced within the patent."

It seems to me that in granting clearance to protect a run, we are doing precisely that. Protect a run can mean nothing else but protect the revenue of the licensee, and we feel that that is something that we cannot do. The major suggestion adds to that, to protect the licensee in the run, the idea of protecting the licensor, and it is my position that under the General Electric and General Talking Pictures cases, the latter decided in 1938, that that is the only proper provision that we have a right to impose any^d restriction which is reasonably related to the reward of the licensor.

One other thing and I am through, again in connection with clearance: I spoke yesterday of the mutual incompatibility (4234)

between protecting the licensor's interest and also the licensee's run, as suggested by the majors, and took one example of a flat rental contract. We sell a picture for a thousand dollars. Your Honors have held that we are completely out on a flat rental contract, that we have no continuing interest there and we have no right to fix the admission prices. Our interest, if we are getting a thousand dollars for that run, is to fix as short a clearance as possible in order that we may be able to get as much as possible from the subsequent runs. That is as plain as could possibly be. What is the licensee's interest? The licensee's interest is to have as long a clearance as possible, so as to be protected as much as possible from the subsequent runs. Therefore, I cannot understand how we can protect the licensor's interest and the licensee's interest at the same time. How can we grant any clearance in excess of what is reasonably necessary to protect both the licensor's interest and the licensee's interest? I cannot understand how any such thing is workable at all. Now, that is to be arbitrated. I cannot understand how the arbitration of such a thing can possibly be the fact.

I thank you.

(4235)

Mr. Seymour: Turning to section III, the heading of that section on page 13 merely follows the form which we followed

in section II; that is, the injunction is against the defendants as exhibitors, whereas in section II it was against them as distributors. That structure seems to us convenient and desirable for clarity.

In subdivision 1 of III we have brought into the injunction against the defendants as exhibitors the inhibitions of section II on franchises, formulate deals and master agreements made with distributor defendants, and we think that is the convenient way to incorporate the appropriate provision there. The Government's section I is inappropriate first because the incorporation of paragraph 5 of their draft brings over their injunction against all clearance contracts between defendants, which we discussed on Tuesday, and as to which we take the position that, of course, the Court should only enjoin the agreements to the extent that they are unreasonable, as the opinion indicates.

In addition, their paragraphs 6 and 7 which they seek to incorporate by reference by section I, enjoin master agreements, formula deals and franchises with non-defendants. We do not think the Court intended to reach out beyond the parties to the suit in that regard.

(4236)

Mr. Caskey: May I just point out to the Court that Tuesday we agreed that in lieu of our proposed subdivision (5) of section II, we would take subdivision (7) of section II as proposed by the Government, as we amended it orally in court.

Mr. Seymour: That would still require or still indicate the adoption of our form of section I.

Mr. Caskey: That is correct.

Mr. Seymour: The reference to the Government's subdivision (7).

Now as to Arabic 2 on page 14, that is a section in three subdivisions in which we deal with your Honors' disposition of theatre pooling agreements; and we specify in the three subdivisions the types of pooling agreements which are enjoined. Subdivision (a) deals with a pooling agree-

ment involving a given theatre of a defendant and a given theatre of an exhibitor, normally in competition with the defendant's theatre where they are operated as a unit or whereby the business policies are collectively determined by a joint committee or one of the exhibitors, and whereby the profits of such pooled theatres are divided among such defendant and such exhibitor.

(4237)

Now the difference between our language and the Government's is primarily in the use of the word "and," "and whereby the profits of such pooled theatres are divided."

In your opinion in discussing the pools which you find illegal you use the word "and." In the portion of your opinion suggesting a decree you use the word "or". We rather assumed in view of the traditional definition of a pool that the word "and" was the one that you had intended because it is perfectly obvious that normally in a pool operation of this kind an essential characteristic is that the profits of the pooled theatres are to be divided, and we think that ought to be adopted and the other changes are purely in the interest of clarification.

The reason I think the word "and" is important is this: there may be situations where a defendant owns a theatre and has leased perhaps from some real estate operator or anybody else another theatre on a straight rental or on some other basis but where there is no division of profits between the theatres, but since the defendant is the owner of one theatre and the lessee of another, he naturally operates them together. I don't think your Honors were talking about that kind of pool.

Mr. Wright: May I say something on that? I think counsel

(4238)

overlooks Paragraph 4 of our judgment, and subdivision 2(c) of theirs which deals with the lease situation. It is perfectly clear there is no attempt to enjoin the making of leases except where there is a profit-sharing arrangement. That is explicitly covered in their provision and in our provision.

But where they say they think they would like to be able to make or to continue to perform pooling, "a given theatre of a defendant and a given theatre of an exhibitor, normally in competition with the defendant's theatre, are operated as a unit, or whereby the business policies for such theatres are collectively determined by a joint committee."

Now they say both those situations apparently should be permitted if there is no division of profits. That seems absurd to us. Regardless of whether there was a division of profits or not, if the policies are jointly made and if they are operated as a unit, clearly that is the kind of operation that the Court intended to condemn and prohibit.

Mr. Seymour: We took it from your Honors' opinion that you were concerned with the traditional pooling situation where there is a division of profits. We were also concerned with what Mr. Wright thinks the language was not intended to reach and I think the only way to be sure on that is to have the decree clear enough on that point.

(4239)

Now in subdivision 2(b) we deal with the pooling agreements where the parties agree that they may not acquire other theatres in the competitive area where the pool operates "without first offering such other theatres for inclusion in the pool."

That represents no real difference in substance from the Government's language. We think it is a little clearer and therefore suggest that since it is important that the decree be clear, that we use clear language.

Turning over to page 15, 2(e), the language of our 2(c) makes it plain that the type of pooling agreement there dealt with is one where there is released by a defendant to another defendant or to another exhibitor operating in the same competitive area and where the profits of the allied theatres are divided. And we think it plain from your Honors' opinion, which is commented upon in the right hand column, that the reference to profits are profits of allied theatres, but that you did not intend to bar a lease where there was no—a lease at

least not involving another defendant, where there was no division of profits.

Now we provide, as the Government also provides in its draft that such agreements mentioned in Section 2 are terminated within two years after the date of the decree. That is the idea suggested by the Government and the only difference between us is that we have another provision in this decree (4240)

that the time provisions do not begin to run until the decree becomes final—final by failure to appeal or upon the mandate of the Supreme Court. Obviously a change in the status quo as to many of these matters today would be difficult until the decree has finality.

Our Section 3 deals with ownership in conjunction between defendants of a proprietary interest in a theatre or a corporation and so on, and then also deals with the situation where one defendant leases to another on a profit-sharing basis. Both those are enjoined.

We think it important that the word "proprietary" be used to make it plain that in a mere lease between defendants on a flat-rental basis, where defendant A leases to defendant B on a flat rental basis, that this is not intended to bar such lease because in your opinion you indicated that such normal business transactions were not to be enjoined. If you use language other than "proprietary interest in conjunction," there might be a doubt about that situation, and the Government suggests language which I think is doubtful in that regard. We again provide that such relationship shall be terminated within two years and the remaining differences between our draft and the Government's are these:

First, there is no provision in our draft for approval of (4241)

the Court where a joint interest between defendants is liquidated by one defendant buying out another. Your Honors, you recall, dealt with two situations involving common interest. One was this joint ownership between defendants. The other was a joint interest with independent exhibitors.

That whole matter is dealt with in our Section 4. You did not indicate that you thought it necessary to have court approval for transactions between defendants where one bought out the other, and I should think it was unnecessary because obviously in such a transaction there is no real interference with the competition in the area where one defendant buys out the other. That simply liquidates the illegal relationship which your Honors have found, and I don't see why your Honors should be bothered with applications. At least you didn't direct it, but the Government's draft does.

Judge Hand: What does the Government say to that?

Mr. Wright: There is no question about the fact that it goes beyond what the Court ordered in the opinion. We felt it was necessary to go beyond that as a corollary in our proposal in order to prevent the defendants from using each other as outlets for their films. Naturally any such purpose might be frustrated by so handling that the distribution of joint interests went to two or three of the defendants in a (4242)

town where there was only one in the town before.

It was where the effect of that kind of competition would not permit real competition but would restrain, that we made this provision, and for that reason we provide for the exercise of judicial control.

Judge Hand: Is this 3?

Mr. Seymour: Yes, your Honor, I am on Section 3 on page 15. The transaction that Mr. Wright says he is worried about obviously couldn't occur under this section.

Mr. Wright: Our provision is in our 5. Obviously the provisions in our decree are necessarily related to the other provisions of our proposed decree. You don't get a cohesive, coherent document out of taking some of ours and applying them to some of theirs, or vice versa.

Mr. Seymour: I think what Mr. Wright means to say probably is that this is another inhibition like his cross-licensing inhibition which we have dealt with, which is not

in the opinion and is designed to have the effects which we have already discussed.

One other thing which the Government does not include. In Section 3 it is provided in our draft that any lease or agreement which violates the section may be eliminated by inhibition. That seems a practical provision and that is simply a matter of convenience in carrying out the Court's decree.

(4243)

Now I pass to section IV—I am going to page 16, subdivision 4, and take up first 4(a); and let me preface my discussion on this section by saying this: This is the section which deals with the partial divestiture ordered in your Honor's opinion by which you required the defendants to divest themselves of interests which they held in companies or theatres with independent exhibitors where the interest was more than 5 per cent or less than 95 per cent; and this whole section deals with that subject.

That was a matter which, as your Honors know, was not litigated, really. The Government asked complete divestiture. We argued that there should be none, and there was never an occasion when the question of whether particular interests ought to be divested or involved any illegality, was the subject matter of proof. Your Honors concluded that the pools were illegal, and quite naturally assimilated these joint interests with independent exhibitors to pools, and included, on that assimilation, I assume, that these joint interests had to be divested:

Now, we provide in this section for divestiture, as your Honors have directed; but in view of the fact that the record in this case really contains no details as to particular situations, we have included a provision for applications to the Court after the decree is entered for exemptions of some (4244)

situations from the decree, and have laid down the standards which your Honors will want to consider in that connection.

From the Paramount's point of view—other defendants are concerned in this connection, but Paramount, I think it is fair to say, is particularly concerned—your Honor's opinion directing divestiture of the 5 to 95 per cent situations struck at relations involving somewhat over a thousand theatres. Those theatre investments are considered by the management of Paramount to be worth somewhere in the neighborhood of 100 to 125 million dollars. They have a book value of somewhere in the neighborhood of 40 million dollars. I mention those figures only to show that there are very substantial problems involved in that aspect of your Honor's decision, and I ask no change in the decision, and I am not quarreling with it. I merely suggest, as this decree does, that opportunity be afforded to come in and present special situations from time to time where your Honors might find that it was undesirable or unreasonable to apply your decision its full rigor to a particular situation which you have never examined before.

Now, with that background, section 4(a) requires or states that the defendants are enjoined from continuing to (4245)

own in conjunction with any independent exhibitor proprietary interest of more than 5 and less than 95 per cent. That we think is precisely in accordance with your Honor's direction:

Now, the definition of an independent exhibitor contained in footnote 11 on page 16 is a significant part of that provision. We understand your Honor's opinion to conclude with respect to such relationships that if the relationship was with one who was really qualified to be an independent exhibitor and who but for the relationship would have been operating one of these theatres, that that is what your Honor was striking at, and that is what the definition provides. The independent exhibitor is one not a defendant or associated with a defendant who but for such joint proprietary interest would be operating one or more of such jointly-owned theatres for its own account in competition with the defendant.

Now, what that takes care of is a situation where, for example, the co-owner is a widow or an investor or a bank, and where it is perfectly evident that but for the relationship the co-owner would not be operating the theatre as an exhibitor. I do not think your Honors had in mind that there (4246)

was any restraint in that relationship. That is the reason for the language in that footnote. It differs from the Government's fundamentally. Your Honors used the words "restraint of punitive competition" when you dealt with this situation. The Government uses the word "potential". We have tried to carry out what we understood to be the spirit of your view in our definition. Obviously the widow in one view might be a potential competitor, because anybody, I suppose, theoretically could be a potential competitor, but she would not but for the relationship be operating one of the theatres. Therefore we think the word "potential" is far too broad and carries quite a different connotation than your word "punitive."

Judge Hand: Maybe I do not get it too well, but how could anybody on earth tell what she would do? In the case you mentioned she probably would not do it herself but she might do it through somebody else, and she would then be equally an independent. (4246a)

Mr. Seymour: I think what your Honors had in mind, at least, from having read your opinion, was that there was a restraint in the ownership of somebody who, but for their relationships, would in fact have been an exhibitor.

Plainly, the investor, without any experience in the motion picture business, without any operation of a motion picture theatre, is one who would not be. Now, concededly there are widows who might be, who might be a widow who is an active motion picture operator, and we do not suggest that widow alone disposes of the point. My point is that there are a few situations where we have this distinction excludes situations which your Honors' ruling did not have in mind.

Finally, in Section 4(a) we have a provision in the last three lines for applications to the Court for permission to retain interests which are required to be divested by the first part of Section 4(f), and that is the provision, there are several others, which I was referring to when I said we wanted an opportunity, if so advised, to be able to come in at a later date and show your Honors the particular facts.

Judge Bright: Where is that?

Mr. Seymour: That is the last three lines in Section 4 on page 16.

(4247)

What we want to do is to have the right to come in at a future date and show your Honors, as required by Section 4(c), that the retainer of a particular interest would not unreasonably restrain competition in the area. Section 4(c) requires such a finding in connection with any such application. I think it is proper, in the present state of this record, since the matter was never litigated, item by item, that that opportunity should be reserved to us, and it is of the greatest importance to Paramount, and we think of equal importance to other defendants, and we would feel that your Honors would want to keep that way open to consider particular facts.

Of course, there is another aspect which is raised by section 4(b). 4(b) is our attempt to comply precisely with your Honors' decision as to how to dispose of these interests. You direct that the interests be disposed of by a sale or a purchase or by a division of assets. Precisely in accordance with your Honors' opinion our Section (b) provides that purchases or divisions of assets shall be subject to court approval.

The Government inhibits any purchase now under the form of decree. They just bar any purchase or division of assets by which the defendant could acquire any part of it, even with the approval of the Court! That is plainly directly contrary to your opinion.

(4248)

I want to state an additional reason for that reservation in 4(f). It is possible that as an attempt is made to work out the various dispositions which will have to be made under the decree some impasses may be reached. For example, the Paramount theatres that are affected are owned by in the vicinity of 300 corporations which are located in many states. The laws of the various states differ as to the rights of forcing a dissolution, which might be possible in some situations, one cannot tell yet, and since there is no control, really, over what the other party to the transaction does, there may be impasses, and, in that event, Section 4(a) would give us a right to come to the Court and ask to be relieved of a direction because of that particular situation, and, of course, we would have to come and make a showing as required by 4(c). So that 4(c) really states the standards which we would have to satisfy the Court of under the other sections.

You will note in 4(b) that the time within which that direction that is to be complied with, that is on page 17, has been left blank in this draft. Your Honors can appreciate what a colossal task it is to attempt to carry out this direction, where so many theatres, so many interests are involved. We hope that your Honors will give us a substantial period of time. I think the Government has

(4249)
suggested two years. We think that is inadequate. We think that with the most diligent effort it will take a considerable period of time to clean these situations all up, as, in accordance with your directions, such must be cleaned up. We would suggest, as a tentative period, I think, something like three years, with the expectation that under your reserved jurisdiction, if we need more time on a particular situation we may come in and ask for it; but if your Honors were disposed to give us more time, that would be welcome.

Judge Bright: You have the same privilege on two years to come back and ask for relief.

Mr. Seymour: That is true, but your Honor can appreciate what the problem is in trying to deal with the vast number involved here, and we think if we had a somewhat longer period, the chances to make substantial progress within the initial limitation would be somewhat greater.

Judge Hand: Have you been trying to do any of these things now?

Mr. Seymour: You cannot do anything, if your Honor please. You cannot really do anything in the way of trying to make a deal with a co-owner while the uncertainty as to whether this is the final disposition of the case remains. The Government has indicated that they are going to appeal, that has been widely published in the trade press and elsewhere, (4250)

and until the decree becomes final it would be very difficult indeed to make any progress in the direction of working out negotiations.

And, of course, as my learned brother has pointed out, if we did make any changes in the situation, non constat, it might not be at all affected by the results of an appeal.

So, really, until the decree becomes final, it is difficult to make progress in this direction with the best faith in the world.

Finally, we have gotten to 4(d). Here I want to tell your Honors about it, because that is almost entirely a Paramount problem. 4(d) on page 18 provides that when it is shown that a joint relationship between an exhibitor defendant or a subsidiary or an independent exhibitor resulted from the sale by the exhibitor defendant or a subsidiary or a trustee in bankruptcy of the partial interest, the exhibitor defendant may apply to the Court for relief to retain it.

I believe there are four situations affecting Paramount, there may be one or two more, but I think four is correct, where the trustees in bankruptcy, either of Paramount or of Paramount Publix, or some other subsidiary then owning 100 per cent of a theatre, were, by reason of the bankruptcy, put in a position where they had to dispose of a portion of

(4251)

the interest in order to preserve the rest, and those dispositions were approved by the trustees, and, in some instances, at least, by the Court. We do not say that that disposes of the issue for this Court. We do say that that ought to present a situation where, if the transfer back of the 50 per cent interest, or its retainment does not involve any substantial restraint or any unreasonable restraint, we ought to have a right to apply to the Court to keep it. Only special situations result in that condition.

Judge Hand: There are a great many theatres, though, aren't there?

Mr. Seymour: There are a number of theatres involved.

Judge Hand: Where are those theatres, on the West Coast mostly?

Mr. Seymour: No, the theatres are, some of them, in Virginia, some are in Pennsylvania, some are in New England, and some of them are now in Nebraska.

There are four different situations where the backgrounds indicate that the transfer could not possibly have been made for the purposes of restraint; and we have been hopeful, if we could satisfy your Honors on a hearing of those facts, if we decide to apply, that your Honors might perhaps take those out of your decree in the event that we ask for the opportunity to present that situation.

(4252)

Judge Hand: That rather leaves me cold.

Mr. Seymour: Well, I hope your Honor won't prejudge it.

Judge Hand: No.

Mr. Seymour: I hope, because again——

Judge Hand: We have pretty well prejudged it already.

Mr. Seymour: But, you see, the difficulty is on this situation, as on some of the others, we did not have an opportunity, really, to present the detailed facts which would enable you to examine the details of a particular situation because this issue was really not litigated. There was some brief reference——

Judge Hand: I thought there was a great deal of talk about it.

Mr. Seymour: There was a lot of talk about divestiture, but I do not believe that anyone, until your Honor had reached that conclusion, had supposed that a 95 per cent and 5 per cent line would be drawn, or it was argued that that should be drawn. I think that is your Honor's line. All I ask is, you having drawn the line after the testimony closed, that we be permitted to reserve the right to come in. If your Honor, upon such application, decides against us, that is the chance we must take, but I hope you will preserve the right (4253)

to come in. That disposes of Section 4.

Section 5—

Mr. Wright: Would you rather hear me now or later?

The Court: (Judge Hand) On this, yes.

Mr. Wright: I do not know. If the Court please, how much time you want me to spend in discussing their proposal or whether you want me to confine my discussion to ours.

I think it is quite apparent to the Court what has been attempted here by them in the modifications that they proposed in the opinion. What they seek is essentially an opportunity to relitigate all of these questions that we think the Court decided.

In so far as evidence is concerned, ample opportunity was given them to put in the whole story of every acquisition, every pool they had. We facilitated the presentation of that evidence by letting them put it in through stipulated testimony without the necessity of calling witnesses. There cannot possibly be any occasion here for further hearings, such as they contemplate, except to relitigate these questions that have already been decided.

On this deadlock question that was raised by Mr. Seymour, the possibilities of deadlock, on this question of sale (4253a)

or purchase by two parties, that is what led us to propose

in our proposal, which also departs from the Court's opinion, that instead of trying to permit a purchase by these defendants, or a sale by them to the independents, that the thing ought to be settled here and now, and settled, in our view, in favor of a sale to other parties, not necessarily the partner, but a sale, in any event, a divestiture of the defendant's interest.

(4254)

Now, the reasons for that, the practical reasons for that, are these, that this Court simply does not have any control over what the independent partner does with his interest. If he does not want to buy or sell at a particular price, there is nothing you can do to make him buy or sell; but you do have jurisdiction over the defendants, and it seems to me rather than postpone indefinitely the resolution of those controversies—it is perfectly obvious that they want to maintain every one of these joint relationships that they can—that you should and you properly may order that these pools be dissolved by a sale of the defendants' interests, and that is what we have provided, not necessarily to the partner but simply by sale to someone.

Now, of course, I do not think the time limitation there as it is put in the first instance is so important, whether it is two years or three years. In any event, we know in situations of this kind they always get extensions if it appears they have a good reason for not having been able to carry out the kind of divestiture that has been ordered; but I do not think we ought to be in a position where we do not know until the end of some two or three-year period whether anything has been or is going to be sold at all, and what if any difficulties are preventing it from being sold; and I think

(4255)

the provisions we incorporated for periodic reports to the Court as to what is being done are essential to any efficient administration of this plan to dissolve these pool situations.

Now, our definition of "independent" of course does differ greatly from theirs. They say the term independent exhibi-

tor as used in this decree means an exhibitor. Now, that takes care of the widow or the mere investor. They say it has to be an exhibitor. That is more rigorous than our definition right there; but then they go on and put this proviso on the end so that even when he is an exhibitor they can come in and litigate the rather vague question as to whether or not that particular exhibitor but for this interest would be operating these theatres, a wholly speculative inquiry that I think would——

Mr. Seymour: Is that an "or", Mr. Wright?

Mr. Wright: You are right, I beg your pardon—"or a person, firm or corporation." But, in any event, this last proviso it does seem to me to introduce a completely vague standard there that would permit them to retain any one of those interests.

Judge Bright: What do you say about the criticism being made of your use of the word "potential"?

Mr. Wright: I would say as to our "potential," if your (4256)

Honors' word "punitive" is preferred, I think that might be a reasonable substitution. But it is essential, I think, that you do not get into an inquiry at this late date as to what might have happened five, ten, fifteen years ago if the pool had not been made.

Now, as far as their test of exemption in (c) there, they want to hang on to these relationships if on a retrial here we do not show that they unreasonably restrained competition, and that just seems to me is an express provision for relitigating what you have already decided. That gives us nothing. If we can show that any relationship unreasonably restrains competition between two people, we can dissolve it and enjoin it under the Sherman Act by an independent suit. That, it seems to me, has no place in this decree at this stage of the game.

Now, as to this last one, (d), obviously all of that data that he wants to again submit to the Court was in the record, and I assume it was considered by the Court when the deci-

sion was made that these relationship were, per se, violations and should be dissolved, and I can see no occasion other than to frustrate the dissolution of the pools to permit them to relitigate the matter in that fashion.

Mr. Seymour: Your Honors, Mr. Wright keeps talking (4257)

about these things as pools. It was for precisely that reason that I thought you had assimilated these two pools and had not had occasion to examine the particular facts which we never litigated. When Mr. Wright says that we litigated them and therefore we are trying to relitigate them—all we are asking is for a chance to avoid the potential, terrible destruction of values which may occur by having the matters submitted to your Honors' discretion if a decision is reached, to apply at some future time; and I think that is the kind of reservation that ought to always be made by a court of equity which has not heard proof on the particular subject.

Now, the suggestion that Mr. Wright should now have a provision in the teeth of your Honors' opinion that these interests must be sold rather than that we may be able to satisfy your Honors that it would be proper to buy, seems to me a most shocking suggestion. Mr. Wright shows very little concern with the public interest in preserving the values that are involved, an interest which is shared by the stockholders of the companies and I think by the public.

Judge Hand: Well, I do not think we are going to do any such thing as that.

Mr. Seymour: I should think that matter ought to be (4258)

left flexible as your Honors directed it should in the opinion.

Judge Hand: That is what we intended to do.

Mr. Seymour: Now I will pass on, if I may, to section 5 at the top of page 5. That is the injunctive provision dealing with future acquisitions. We have tried in our language to follow the Court's opinion. Mr. Wright has suggested an absolute ban on any future acquisitions. He says "from

expanding its present theatre holdings in any manner whatsoever." Now, that is directly in the teeth of your Honor's opinion.

Judge Hand: We are not going to have any such drastic provision as that. We considered that.

Mr. Seymour: Section 6 is a provision for notice to the Department of Justice, of course, in connection with any application to the Court on the reserved matters; and IIII on page 19—

Mr. Wright: May I discuss for a moment their 5 and our 5 on the question of expansion?

Judge Hand: Yes.

Mr. Wright: What we proposed, if the Court please, was not a provision against any acquisition. We proposed a planned injunction against expansion, and we did that for two reasons: one to resolve the question as to what kind of expansion the Court intended here in their proposal. We (4259)

do not see that their proposal there would prohibit expansion of any kind, and certainly during the pendency of the final disposition of the divorcement issue we would suppose that it would be proper, in the face of the findings that have already been made, to at least maintain the status quo during that period by preventing the defendants from taking advantage of the period to expand their theatre holdings.

Now, if you will read the provision as they write it, it may be in the terms of your decree, but under it I do not know what if any form of expansion is prohibited; and if none is prohibited, the provision in that form offers nothing to the plaintiff—that is, if it is a question of the 5 that they have there—

Judge Hand: Get down to some specific situation and not just talk in general terms.

Mr. Wright: Let us read it. It says, "from expanding its theatre holdings except for the purpose of acquiring the interests of co-owners of jointly owned theatres pursuant to the provisions of subdivision 3 and 4."

That is plain enough. That means they can expand when they buy out independent partners.

Now they say, "provided, however, that nothing herein contained shall prevent an exhibitor defendant from acquiring (4260)

ing theatres or interests therein in order to protect its investments or in order to enter a competitive field."

Now, if you enter a new, competitive field I suppose that is one thing; but I would imagine that any theatre you acquired in an area where you were already competing might be regarded as a protection of the investments you already had there.

Judge Hand: I should think you are right about that.

Mr. Wright: So the result of this would be that no form of expansion that I can conceive of would be prohibited at all. They can buy out the partners; they can pick up theatres in the fields where they already are; and they can go into new fields where they do not operate now. Well, that, I submit, is a plain grant of immunity. It does not offer any protection whatsoever to any of the objectives that we are trying to achieve.

Judge Hand: They have said, as I understand it, if in the latter case this Court or the district court of the district shall approve, in the latter case.

Mr. Wright: The new competitive field is subject to court approval. Well, may I ask what the Court regards as circumstances which would lead to your approval of their entry (4261)

into a new competitive field?

Judge Hand: Wasn't that very largely in the consent decree?

Mr. Wright: The consent decree—

Judge Hand: Never mind. Answer my question, please.

Mr. Wright: Yes, quite right, and as far as we are concerned the consent decree provision proved in practice to be wholly inadequate to prevent an expansion during that period.

Judge Hand: Why was it inadequate? Was Judge Goddard inclined to let any theatres that wanted to come in? What do you mean by inadequate?

Mr. Wright: There was a proceeding brought under the decree—there were substantial acquisitions by Fox; there were substantial acquisitions by Paramount—

Judge Hand: Did you object to those?

Mr. Wright: Yes, we went in and objected and we litigated the issues—

Mr. Caskey: And you lost.

Mr. Wright: We lost the case. Judge Goddard found that those acquisitions were not a part of a general program of expansion. That was what was prohibited by the consent (4262)

decree, a general program of expansion, and they had these same exemptions to protect investments—

Judge Hand: How many cases were there?

Mr. Wright: Oh, I would say there were perhaps 60 or 80 theatres involved, but there were some of those which were actually closed towns, these acquisitions which converted competitive situations into closed situations.

Now, I repeat if the purpose of this provision is to give protection to the Government, we would think we would be better off with no provision dealing with the subject of expansion at all than this proposed V; that is the rights that we have under the Sherman Act as such we think are superior to the rights that we would get with such a provision as is proposed here; and we think in effect it would be a grant of immunity from the Act.

Judge Goddard: Mr. Wright, is it your recollection that the Court permitted them to acquire 60 or 70 theatres?

Mr. Wright: That I think was about the net result of the Court's decision. Of course, there was no provision if your Honor will recall, for submitting the proposition prior to acquisition. These acquisitions had gone on for some time, and then they were set forth in petitions which we filed.

Judge Hand: You mean after the consent decree?

(4263)

Mr. Wright: Yes, the consent decree itself provided that that provision was enforceable.

Judge Hand: That may have been acquired after the consent decree.

Mr. Wright: Yes, after the consent decree but prior to the institution of the petitions on which we sought to prevent the expansion.

Judge Goddard: Each of those presented a particular situation, and I thought it quite evident that there was not a general plan of expansion. I was convinced of that.

Mr. Seymour: I think the failure of those theatres—as Judge Goddard will no doubt recall—arose due to the fact that one Sparks who had a fifty per cent interest in a number of theatres in Florida, wanted to go out of business and came to Paramount and asked to have Paramount buy his remaining fifty per cent interest, which he did, and that is the way a number of theatres were involved.

Mr. Wright: Don't misunderstand me, Judge Goddard; I am not arguing that your decision in that case was wrong. If we thought it had been we would have appealed from it. We didn't appeal. We thought from the terms of that decree your decision was right, but I am merely pointing out that that kind of decree provision we are not satisfied does us more harm than it does good.

Judge Hand: I don't see why you don't think his decision was wrong. (4264)

Maybe you didn't think his decision was wrong. Of course you changed many times in your position in this whole litigation. How could you have failed to appeal if your views about the subject matter had been the way they are now?

Mr. Wright: Because, if the Court please, we were bound by the decree. We had a decree which did nothing to prohibit expansion in those terms which were adequate to do it.

—Now the failure of the decree to live up to proper Sherman Act standards was essentially our fault in negotiating rather

than Judge Goddard's, and that is why we did not appeal and could not appeal, as I saw it, from his decision.

Judge Goddard: Mr. Wright, do you think the defendants should be prevented from acquiring an interest of a partner?

Mr. Wright: From what?

Judge Goddard: A situation like that, where a defendant owns fifty per cent of a theatre together with another.

Mr. Wright: Yes, we do. We think the proper disposition of those situations is to dissolve that pool by a sale of the defendant's interest.

Judge Hand: You mean a sale in which the defendant (4265)

was prohibited from buying? A sale under which the defendant was prohibited from buying?

Mr. Wright: That is right, a sale to independent interests. That is the way we think those relationships should be dissolved.

Mr. Seymour: Of course, your Honor, what we have done here, I think, is to follow your Honors' language precisely. There is no intention on the part of my client to start a campaign of expansion; but as your Honors properly recommend in your opinion, to shackle these defendants so that they cannot go into a new competitive area, and that they can only do as your Honors permit, or to shackle them so that they could not fix up or build to take care of an obsolescence or a fire situation, would be a very burdensome provision.

Mr. Wright: I don't understand how the District Courts other than this Court are to have jurisdiction to approve these applications. Has any thought been given to that? That is not in the opinion. That apparently is something that has come up here.

Mr. Seymour: That is right. Your Honors wrote that it shall be subject to the approval of this Court or other competent authority. We assumed that by that that your Honors meant the District Court in the district, and we put it in.

(4266)

If your Honors have something else in mind, we will put it in.

Judge Hand: Well, what about that? Is this court supposed to live and endure forever?

Mr. Proskauer: We hope so.

Mr. Wright: Insofar as it reads the Southern District of New York, I suppose that it will endure as long as any district.

Judge Hand: Then you want instead of "District Court," you want to say "or the District Court for the Southern District of New York."

Mr. Wright: If the Court please, we don't want that in at all.

Judge Hand: Now assume that it is going to be put in there. We put it in.

Mr. Wright: I would assume that would be necessary to fix the limits of your own jurisdiction in that connection.

Judge Goddard: Will all those proceedings come to the Southern District of New York, no matter where they arise throughout the country?

Mr. Wright: This Court is sitting in this litigation as a specially constituted district court for this district.

Judge Hand: I know, but I think you ought to get rid (4267)

of this specially constituted district. Are you going to create in every case *ex necessitas*? If these judges are out a new set of judges so as to have a three-judge court, and call it an emergency court, fifty years from now?

Mr. Wright: No. If the Court please, I assume that for the purposes of administration of whatever final decision comes out of this litigation we don't need three judges.

Judge Hand: All right, then you mean the District Court for the Southern District of New York.

Mr. Wright: Yes.

Judge Hand: I should think that might be reasonable; maybe necessary. Now go on.

Mr. Caskey: Section IV, which is printed on page 19, follows the language of the opinion and enjoins a defendant from operating, booking or buying features for any theatre through any agent known by it to be acting in such capacity for any other exhibitor whether it be independent or affiliated. The only difference between us and the Government is that we have inserted the words, "known by it," which is obviously a necessary precaution.

Roman numeral V—

Mr. Proskauer: Not to argue but to help your Honors to keep track of what is going on, you will note that Paragraph (4268)

graph 8 under plaintiff's proposed judgment column on page 18 is the Government's provision about diagonal licensing that we have all been talking about.

Judge Hand: Yes.

Mr. Proskauer: That is the one that we have the best sentence passed on.

Judge Bright: Just a minute. Is there any objection to the insertion of "known by it" in your provision?

Mr. Wright: It seems to me too trivial to argue about. I would assume with them the responsibility in any of these provisions in knowing what their agents are doing.

Mr. Caskey: Well, do you say yes or no?

Mr. Wright: I say that I can't believe that it is a matter of substance. It seems to me a silly thing to put in.

Mr. Proskauer: That means yes.

Mr. Leisure: If the Court please, Section 5 under the defendants' proposed decree reads:

"Nothing contained in this decree shall be deemed to apply to the leasing or otherwise contracting for the temporary use of a theatre for the road showing of a particular feature."

Now that only applies to a picture, as you will observe by the footnote 12:

"Because of its character or unusual cost, cannot, in the judgment of the distributor defendant, exercised in good faith, be distributed as advantageously by the distributor's normal method of distribution, and which is exhibited by such defendant at advanced admission prices."

(4269)

Now the reason for that provision is that from time to time the industry has produced these extremely costly pictures which have advanced the art, and we believe thereby benefited the public, and over a period of years those pictures have never been large. In the past ten years there were four.

Judge Hand: Wouldn't they become large if they were exempted from this decree?

Mr. Leisure: I don't think so.

Judge Hand: I mean, wouldn't there be a great inducement to claim road showing over them?

Mr. Leisure: No, because of the risks involved and the losses I don't think it would ever be large. In fact the past history shows that they have never been large. In the last ten years there has only been four of these pictures.

Judge Hand: You mean by any of these defendants? You mean by all of them?

Mr. Leisure: By all of us, yes. Only four in the last ten years. If your Honor feels that there is any chance of there

(4270)

being a large number, and I don't feel there is, you could limit it by placing a number on them.

Judge Hand: I think it is a kind of unimportant thing to provide if there are only four that have been produced in the last ten years.

Mr. Leisure: Let me say why it is important to us, why Universal pointed out why it is important to them.

It is important to RKO, as I have said, because of the unusual cost for the pictures. They must be distributed at an advanced admission price if the cost is to be recouped.

Judge Hand: Have they cost any more—these road shows—than any other expensive pictures?

Judge Goddard: The Vanguard cost five and a half million.

Mr. Leisure: If I may advert for a moment from what I was about to say, just to give an example on that, Judge Hand, long prior to the decision in this case, on April 18, 1943, to be exact, RKO contracted with an independent contractor to produce a best seller book known as The Robe, dealing with a deeply religious subject. The picture is to cost about five million dollars. By the time we finish with dis-

(4271)
tributing and advertising it will cost well above nine million dollars. Although we entered into that with an independent contractor the risk is entirely RKO's. With the experience of every producer—not just ours alone—the experience has shown that it would be extremely hazardous if not impossible to recoup anything like nine million dollars in the regular course of business. The road showing for those great shows such as Birth of a Nation—

Judge Hand: Now RKO could show that in a dozen theatres at any price at any place it chose ahead of anybody.

Mr. Leisure: We only have one hundred theatres your Honor, and we simply would never have attempted to make a nine-million dollar picture and have only the right to show it in our own theatres. It would be just impossible.

Mr. Proskauer: Why don't your Honors limit it by putting in something about the upset cost of the picture. Nobody wants to apply that to ordinary pictures.

Judge Hand: How about that, Mr. Wright?

Mr. Wright: Our position, as I explained before in connection with the Vanguard petition, is that we don't see any merit in any road show exemption as such, and particularly not in this kind of exemption that is proposed here. What they want to do here is pick up a theatre and lease it temporarily for a particular exhibition anywhere, any time that

(4272)

they have a picture that they think is special and that that is the best way to exploit it.

Judge Hand: Now assuming that this could be limited to a very few, to very expensive pictures, what harm would it do? It might induce them to make them when they wouldn't make them otherwise.

Mr. Wright: That I doubt, if your Honor please, but on the assumption that it would be so limited to the mostly costly pictures, I would still say that the provision by itself, by its terms, provides an obvious means of avoiding the price-fixing provisions of the decree.

Now what would you do here? In the ordinary exhibition you lease a film to a theatre for a percentage of the gross receipts, or, as these defendants have done in some cases, a percentage of the profits. Now suppose that you just change your agreement into a form of a theatre lease for the duration of the engagement and the theatre operator simply leases the theatre to the film owner with the license term stated so that he receives the reverse percentage of the receipts of the engagement?

Now obviously, if you are going to permit, open the door to what this provision says you can do there, I think gradually you just eat away all of the prohibitions that are now in the decree.

(4273)

Mr. Raftery: May it please the Court, we are vitally interested in this proposal. We are road-showing now one picture here in New York, Henry V, by a man named Shakespeare. The only way you could get the public, really, to come to see that picture was by a special presentation. That is the first road show that we have had now in nearly ten years, and we think we have had more road shows than any other company. We have one ahead of us, "Duel in the Sun". I don't like the provision here as written, because it does not read—well, it reads to me more the way brother Wright construes it. If you limit this to one picture a year

per defendant, and under condition that the negative cost—we will forget advertising and exploitation—is three million dollars or more, that is putting it way up in the high brackets, and then, say, instead of talking about leasing a theatre, so we won't be guilty of subterfuge, as brother Wright has said, and say, "Nothing contained in this decree shall be deemed to apply to licensing the exhibition of one road show picture per defendant in a theatre or theatres, use whatever language he wants, really you are making a licensing of an exhibition right, whether you do it by leasing the theatre or whether you do it by percentage of the gross, or whether you do it by flat rental, it is not going to affect (4274)

anybody; then define your road show and in your definition of road show put your limitation of one picture a year for a defendant, negative cost \$3,000,000, and I do not believe that there will be any harm to anybody; there will be no restraint of commerce.

This particular "Duel in the Sun", the negative cost that our producer, Vanguard, has acquired to date, and I got these figures from his banker, is five and a half million dollars actual negative cost to date, without advertising, without printing. The picture has been nearly three years in the making, in preparation. It was conceived long before we got into this trial. I do not anticipate we will have another road show for a good long time unless somebody else decides to make a Shakesperian thing again, and we will be, perhaps, in again.

The Shakesperian picture I speak about, I think we would be barred of because of the definition of negative cost. As I understand, the negative cost of that did not quite reach three million dollars, but I say three million dollars because that is way above the average cost of any of the important pictures.

Mr. Wright: I would say this, if the Court please, if there were to be any exemption at all it should, I think,

(4275)

be in terms of numbers that could be released during a year rather than negative cost. I do not think negative cost is something that is readily ascertainable, as far as we are concerned, and I can't think it offers a very satisfactory standard for determining what ought to go in—

Judge Hand: He has both:

Mr. Wright: One year.

Mr. Raftery: One year and three million dollars.

Judge Hand: He proposed one year and three million dollars.

Mr. Isseks: May I say just a few words? I started this?

The Court: Yes.

Mr. Isseks: We object as an independent producer to the defendants' proposal just as the Government does, and just as counsel for United Artists does. We think it will help the major defendants only. We think, if there is going to be an exception, it will be flat, just as Mr. Raftery has suggested, nothing in this decree shall apply to any picture road shown, and then define road shown as to cost, one year or some other way, but I think if you take the defendants' pro-

(4276)

vision somebody like ourselves is going to be hurt, because we release through United Artists, and they do not have any theatres, and they do not have facilities for leasing theatres, or getting theatres, and I submit there should be some road show exemption to apply to everybody equally.

Judge Bright: It is only to the road show; after it is road shown the picture will take its regular course.

Mr. Isseks: Yes, and then it should be subject to the injunctions against price-fixing and everything else, and it should be that that is so, after the road showing, that it is subject to the injunctive provisions applied in connection with general release. I think we made that clear in our brief and in our petition.

Mr. Wright: I think it would be proper, if you were going to grant a road show exemption, to limit it to non-thea-

tre-owning defendants. It seems to me their owning theatres gives them substantial facilities for that kind of exploitation that others don't have; and if you are going to have an exemption, we would urge that kind of limitation as well as a numbered limitation.

Judge Goddard: What is the history? Haven't they had many more? Apparently you haven't had as many.
(4277)

Mr. Raftery: We have had more road shows, I think, because generally the road show comes from that type of producer that Mr. Keough described on the stand, who takes all his own money and goes out and makes some one of these important pictures, one a year.

Judge Hand: I think you had better propose some of these clauses in your proposed decree. I think Mr. Isseks would like to propose them.

Mr. Isseks: I would like to work on that with Mr. Raftery. We distribute through him.

Judge Hand: Get together with him and agree with him.

Mr. Isseks: We will get together.

Mr. Proskauer: May we revise our proposal along the lines of this discussion—

Judge Hand: Yes.

Mr. Proskauer: (Continuing) —so we will be restricted to one a year a company, to a cost of at least three million dollars?

Judge Hand: Yes.

Judge Bright: Do you road show in more than one place that particular picture?

Mr. Proskauer: Oh, yes.

Mr. Isseks: Oh, yes, we do.

(4278)

Mr. Proskauer: For instance, we have a contract with Mrs. Clarence Day to road show "Life With Father." The picture is costing about four million dollars, and we are required to road show it in New York, Chicago and Los Angeles. It has nothing to do with the general contract.

Judge Bright: What is to prevent, under this general talk we have had here, having all exhibitions of any particular picture called a road show?

Mr. Proskauer: I did not get your Honor's question.

Judge Bright: Under the talk we just have had here now, what is to prevent you from calling all exhibitions of some particular picture a road show?

Mr. Proskauer: What I suggested, that we can only do it with one picture a year.

Judge Bright: That is right.

Mr. Proskauer: And that it has got to cost at least three million dollars.

Judge Bright: That is right, but how many times can you road show that picture all through its existence?

Mr. Raftery: That happened once in 27 years—

Mr. Proskauer: We can road show it through the country.

Mr. Raftery: (Continuing) In 27 years it happened once, and it happened with the same producer who is making (4279)

"Duel in the Sun" who made "Gone With the Wind." It was road shown from coast to coast first time around. It later came back and played all the theatres at popular prices.

Judge Bright: That was so of one of Griffith's pictures.

Mr. Raftery: Birth of a Nation, that was before 27 years ago. That was in Judge Proskauer's time.

Judge Proskauer: Your Honor, we have to show it through the country, and of course, we would like to get the road show through and get into general distribution after that, and then it is subject to all the provisions of the decree.

If you don't do that, you are just going to eliminate pictures like "The Robe" and these pictures of Mr. Isseks' clients, and we won't make them.

Judge Bright: What I had in mind was not to exempt a picture on every show, not to exempt from this decree the showing of a picture all the time as a road show.

Mr. Isseks: Your Honors' definition says clearly your Honors' definition of road show says it is prior to general

release, and that assumes there is going to be a general release, and I think we can work up a definition pursuant to (4280)

Judge Hand's suggestion. Mr. Raftery and I will work together on it and we will distribute it to counsel, and I think it ought to satisfy the Court.

Judge Bright: We enter into the study of semantics again and—

Mr. Isseks: No, I am not going to get into that.

Judge Bright: (Continuing)—I think it is in vain.

Mr. Isseks: I think if we can limit it, by making it prior to general release, limit the cost of the picture, and other limitations as such, I think it will prevent any evasion.

Judge Hand: What about these wild westers they talk about?

Mr. Raftery: Westerns?

Judge Hand: I mean westerns

Mr. Raftery: We have a contract to distribute what are known as Hopalong Cassidys. They are made at a very inexpensive cost and you sell them six at a time. An exhibitor won't buy them unless he can get the whole six, and they are generally popular down in the South and Southwest—very, very popular down there, and Mr. Frohlich here goes to every one of them.

I would like to ask Mr. Wright if he has any exemption those from the provisions of this decree, westerns as they are understood?

(4281)

Mr. Wright: I see no reason for exempting a picture just because it is popular.

Judge Hand: The Government never consents to anything, no matter what. It is a waste of time to ask, and it prolongs our argument. Now proceed.

Mr. Proskauer: We are to redraft something and to submit it to your Honors?

The Court: Yes.

Mr. Leisure: There is only one thing I would like to add, your Honor, and that is on this question of limiting it to one.

We are a little like United Artists, we represent some independents, Walt Disney, for instance, and Sam Goldwyn. If they do present one of these unusual pictures and come in to have it distributed, I do not see what there is in equity or in the Sherman Act that cause this Court to prevent unusual pictures from being shown. And that situation may arise. It won't happen often. People don't reach in to spend nine million dollars; they just don't do it.

Judge Hand: You would either get ahead of the other fellow or he would get ahead of you for that particular year. I know time is regarded as of the essence in these things, but it would only result in not having it as a road show or delaying it as a road show. Would that be one of the calamities of the 20th century?
(4282)

Mr. Leisure: It would never be made, if you did not have some opportunity of recouping the expenditures. You just wouldn't make it. Why should you? And that would mean a decree—

Judge Hand: If it was so good, you might make it a few minutes later.

Mr. Leisure: I cannot conceive of making it as a business enterprise unless you could see your way clear to recoup what money you have put into it.

Judge Hand: Yes, it would be your only road show for the next year or for that year.

Mr. Leisure: Let us suppose Mr. Goldwyn came in, or Walt Disney, and wants to show one the same year? What reason is there in law or equity to say you have had your one this year, we are going to portion this out?

Judge Hand: I do not know. What you say is more or less persuasive, but the exemption is doubtful and maybe we won't grant it, and you had better be contented with what has been suggested, I should say. Now go on, please.

Mr. Leisure: I thought it would be better, instead of having it limited, say, to a number, if you had it limited so you know it was an outstanding picture, it would advance the

art and be to the benefit of the public. In other words, use as your criterion not some arbitrary number, but some figure (4282a)

that would convince the Court that it was one of these outstanding pictures.

The Court: Do you want to use five million?

Mr. Leisure: I think three million would be a better figure.

(4283)

Mr. Caskey: If the Court please, VI at page 20 confines the scope of this decree to the Continental United States. That is a provision which is copied from the provision of the consent decree, and is particularly acute with respect to the distribution of pictures in Hawaii and Alaska in which places none of the defendants operate exchanges.

In the Hawaiian Islands, on the four principal islands, which as your Honors know are somewhat widely separated, there are 107 theatres, many of them extremely small. The method of distribution is to grant to a single company the right to exhibit and in turn sublicense other exhibitors. We furnish only one, very rarely two prints. The picture print is shipped to Hawaii to that company; they exhibit it, and in turn circulate it among the islands. This whole scheme would be utterly inapplicable and probably would result or might well result in a withdrawal from the Hawaiian Islands. There was no evidence whatsoever concerning the situation in either Hawaii or Alaska or Puerto Rico, which are the only three places which would be affected by our proposal—there has been no suggestion of any violation of law in those places, and we respectfully submit that the ambit of the decree should be limited to the proof, and that this should not apply to those territories. I am sure that (4284)

there will be no purpose served, and it might very well deprive the people of those communities of an opportunity to see motion pictures. I do not want to offer proof on the subject unless it is necessary, but we are informed that it is

utterly impossible to build in the Hawaiian Islands at the present time; so if some other system of distribution were required and we were compelled to erect our own facilities, it might be years before the physical facilities themselves could be supplied.

Judge Bright: Any objection, Mr. Wright?

Mr. Wright: I do not understand why the statement in the terms "nothing contained in this decree shall apply to operations or activities or any defendant outside of the Continental United States period" would not suffice. Now, I may be unduly skeptical, but that last proviso strikes me as a little odd. I do not quite see what they are getting at there.

Judge Bright: Activities in the United States relating to distribution of pictures outside of the United States.

Mr. Wright: Well, what possible activities within the United States that come within the scope of this decree would relate to distribution or exhibition of motion pictures outside? I just don't understand.

(4285)

Judge Bright: Mr. Caskey said they distributed them from here.

Mr. Wright: Yes. I suppose to the extent that their distribution activities are here and done here, they ought to be controlled here. Now, it just seemed to us that that is a little too vague to make a satisfactory exemption, as far as we are concerned.

Mr. Caskey: At the time the consent decree was drawn, from which this is copied, we had innumerable decrees under the antitrust laws from the published decrees, and this is standard practice, and the only thing we want to be sure of, the thing that is most important, which I understand you now to agree to, is that it need not apply to the licensing of pictures outside of the Continental United States, which excludes Hawaii, Alaska and Porto Rico.

Mr. Wright: I think that is right.

Judge Bright: I think you made a statement at the beginning of the trial, Mr. Wright, that you were only interested in operations within the Continental United States.

Mr. Wright: That is quite right.

Judge Bright: That you were seeking to suppress a national conspiracy.

Mr. Wright: Quite right.

Judge Bright: Then what is the matter with this?
(4286)

Mr. Wright: I merely repeat that as far as I can see the first three lines take care of any exemption that is needed adequately.

Mr. Caskey: Section VII on page 20 is designed to express that portion of the Court's opinion at page 63 which relates to the right of a defendant to exhibit its own pictures in its own theatres upon such terms as to admission prices and clearance and on such runs as it sees fit. We think it should be included in the decree and not left, because this Court saw fit to include it in the decree part of its opinion. For the purpose of this section we have defined a theatre as one's own in accordance with the footnote 14. That is, it applies to any theatre which we are permitted to retain an interest of 50 per cent or more.

Paragraph 8 I think is without controversy, and relates to the right of the Attorney General to inspect the documents and interview witnesses of the defendants.

Paragraph 9 on page 22 relates to the retention of jurisdiction, and in our judgment that is vital to any decree dealing with an antitrust case in this industry.

The first section (a) is standard language which permits
(4287)

their the plaintiff or any defendant to apply for such orders and directions as are necessary or appropriate for the interpretation, construction, application, enforcement and punishment of the decree. I take it that that language is substantially the same as suggested by the plaintiff, and from page 66 of your opinion.

Judge Bright: Doesn't the form proposed by the plaintiff comprehend all the subdivisions that you seek to incorporate?

Mr. Caskey: No, sir, I think not, sir, and if I may respectfully say, the form contemplated by the plaintiff only is coordinate with our sub-paragraph (a). For example, our sub-paragraph (b) enables us or the plaintiff to apply at any time to modify our set aside the decree, or to take further proceedings in the event that it should appear that the operation of the decree has failed to bring about a correction of the violations of the Sherman Act. We think that this is appropriate in this type of case to show that the Court has retained a supervisory power to modify this decree or to take further proceedings in the event that they are necessary to bring about a compliance with the Sherman Act.

Subdivision (c) is a provision which makes it possible for a defendant to apply to this Court to enlarge any period of time which is required to do an act under the decree. I (4288)

think it is a necessary and reasonable provision in view of the drastic reorganizations which the decree envisages. We hope we will not abuse it.

Sub-paragraph (d) enables any defendant to apply to the Court to modify or set aside the decree as to that defendant in the event that economic conditions or other conditions so change as to make the decree or a provision thereof inappropriate. That we think is necessary in view of the decision of the Supreme Court in the Swiss case; it is a precautionary provision which we think the Court should adopt in order to keep this decree flexible and capable of dealing with the problem as it may exist in future years.

Paragraph X on page 23 relates to a condition which might exist if either by legislation or by a decree which should grant divorcement of other relief similar to that prayed for in the amended and supplemental complaint that would give the defendants who desire a right to withdraw from any arbitration system which might be set up.

Paragraph XI is the paragraph to which Mr. Seymour has already adverted. It fixes the final effective date of the decree and the period for the commencement of the time within which a defendant is required to take action as the (4289)

time when the decree becomes finally effective either by a failure to appeal or by the entry of the final decree upon mandate of the Supreme Court.

Mr. Frohlich: May I be heard for a moment on that section, your Honor?

Judge Hand: Yes.

Mr. Frohlich: The Government, I see, has a corresponding provision that paragraphs 8, 9 and 10 of section II will not become effective until January 1, 1947. I respectfully ask that the time there be extended to July 1, 1947. That is a very radical change of the whole system of selling pictures, especially for these smaller companies like Columbia and Universal and others, and January 1st is just six or seven weeks off from that, and we feel we could use five or six months to build up an inventory to give us an efficient inventory on hand so we can operate with some hope of recoupment. I am not asking for too much. I do not think the Government will seriously oppose it.

Mr. Caskey: Paragraph 13 on page 24 deals with the existing consent decree. We provide that this decree shall be a modification of and in substitution for the existing decree entered on November 20, 1940, and that the existing consent decree shall remain in full force and effect with (4290)

respect to any act or conduct occurring prior to the effective date of this decree. We think the suggestion by the plaintiff that the provisions of the consent decree are to be of no further force or effect except in so far as necessary to liquidate the financial obligations of the defendants in the arbitration association are utterly inadequate; conduct has been taken under the decree, and as to that conduct the decree should be effective.

Plaintiff has suggested in its last sentence that even the existing awards made under that decree and decided by the Appeals Boards should be enforceable only to the extent that they are consistent with the provisions of the decree; or, in other words, that the validity of each one of the existing awards must be reviewed and determined by someone in the light of this proposed judgment.

Finally we respectfully suggest, although the sum of money involved is comparatively small, that it is inappropriate in an equity antitrust case such as this that costs should be taxed against the defendants.

Judge Hand: Do you want to say anything?

Mr. Wright: That last comment, if the Court pleases, really poses very aptly the question that has got to be decided, whether or not we won the case. In every equity case (4291)

that we have brought and won that I know anything about, costs have been imposed as a matter of course.

Now, there are a number of these other last provisions that have been gone over here that I do not think merit serious discussion except on the theory that what you were going to enter here would be some kind of a charter of immunity for these defendants rather than a decree which is intended to prohibit unlawful conduct. If you want that discussion I will be glad to embark upon it. It seems to me to be a waste of time. This retention of jurisdiction, all the elaborate escapes that have been set forth there, if it had ever been submitted to us in the form of a consent decree would never have received the slightest serious consideration.

Now, if the Court is going to give that kind of consideration to it we would like to be heard on it, but it seems to me on its face that it is——

Judge Bright: I think you had better discuss it. Take No. 8. Is there any objection to that insertion that counsel may be present when you are making the examination?

Mr. Wright: As far as whether they have one lawyer or two lawyers looking over the shoulder of our people when (4292)

they examine books, it is not worth discussing as far as we are concerned.

Judge Bright: The answer is no objection?

Mr. Wright: No objection.

Judge Bright: All right.

Mr. Wright: That is right.

Judge Bright: How about 9?

Mr. Wright: 9 is the one I had reference to which I did not think was worth serious discussion. Now let us just take a look at this (b). All that is a restriction on the powers that the Court might otherwise enjoy. He says, enabling the plaintiff or any defendant to apply to this Court at any time to modify or set aside the decree or to take further proceedings in the event that it should appear that the operation of this decree had failed to bring about a correction of the violations of the Sherman Act hereby found to exist and which are the basis of this decree. "Sherman Act violations hereby found to exist." In other words, he wants to limit any further action solely to those violations, notwithstanding that other violations might appear.

For example, what would be the effect of this provision if on a mandate of reversal it appears that there were other violations here by subsequent conduct? I mean, it just is (4293)

nothing but a device to cause doubt on what the Court might be able to do.

Now, this (c), enabling any defendant—

Mr. Caskey: Mr. Wright, just a minute. The authorship of (b) is the Supreme Court of the United States, and that provision was directed by the Court to be inserted. You will find it discussed in the *Appalachian Coals, Inc. v. United States of America*. We did not invent the language. That is what the Supreme Court held was an appropriate pro-

vision to bring about supervisory control over the soft coal industry.

Mr. Wright: In so far as I know, I know of no decree which we have entered in my time, which is relatively short in the Antitrust Division, which contains elaborations of that sort. The provision that we put in there is the standard provision that has been in use.

Now, let us take a look at that (c), enabling any defendant to make any application to the Court provided for in this decree including any application to enlarge the time, etc., etc., which would make enforcement of such requirement—be relieved of any requirement at all when it is inappropriate, oppressive, unduly burdensome, or otherwise.

Now, what does that open up? I do not know, but I should suppose it would invite a petition any time that some- (4294)

body decided he did not like to abide by the provisions of the Court's injunction.

And the same thing is true with your (d), and that concludes what we have to say about 9.

Now, your 10 is simply another escape, this time from arbitration provisions, and in this connection I must say that I think it was rather an odd position to take that in view of the Court's opinion which said that arbitration could only be imposed by the consent of the defendants, to come in here now and say that of course whenever he saw fit to impose it it could do so over the objection of the defendants, and at the same time they come here with a provision which says that even arbitration that they consent to only stays in effect as long as more effective relief which they succeeded in avoiding here is not imposed upon them.

Now, as far as the provision as to appeal, I would see no occasion merely because there is an appeal, that that automatically stays the operation of the decree. I would suppose that any stay pending appeal would normally be limited to such provisions as are appealed from, where someone asks for a stay. If a provision is not appealed from, I should see no reason why it should not go into effect unless

it were so intimately related to some provision that was
(4295)

appealed from that you could not have that provision in the decree in the event of a reversal or modification of the other provision.

That again I think applies to both 11 and 12.

As far as the time element is concerned, I do not think it makes any difference whether you say January 1 or some other date, so long as there is a date that is fixed and you know when there will be some relief.

Now, as to the treatment of the consent decree, it seems to us that the provision that we proposed is the only kind of provision by which you can accomplish an orderly liquidation of the system as such. In cutting it off you have got to remember there are still pending and undisposed of cases; there are awards that were made during the period the decree was in operation.

Now, I should suppose that those awards as we have provided should be enforceable to the extent that there is no conflict between them and any new provisions that are entered here.

Now, their provision of course contemplates a continuation of virtually what would be a consent decree between them and the Court over our objection; and as to that, that is something which is primarily a matter for the Court to decide.
(4296)

termine. We have said all we have to say about the propriety of that suggested procedure.

Now I should like, if I might, to address myself to a question that Judge Bright asked which my colleagues tell me that I did not understand at the time. I gather from what they say that the situation you asked me about and which I answered you about was a one-theatre town rather than a town in which there were a number of theatres owned by all of the defendants; and in that connection I would like to say that in so far as I can see, there is no town which would not benefit by two theatres as against one. That is,

two theatres are always in a position to show more pictures, give the public service, make more pictures available to them than one. But if your Honors should feel that you have evidence in the record from which you can independently conclude that any one-theatre town that these defendants are now in would not under any circumstances support another theatre, then you would be completely justified in simply eliminating that one-theatre town situation and all one-theatre town situations from the proposal that we made, and the effect of such elimination would be very insubstantial because of the limited number and small size of those situations.

(4297)

There is just one other comment I should like to make on Mr. Davis's fear that the demands imposed upon the three minor defendants to supply product which our proposal would involve might not be met by them. Well, his argument and the entire argument of the defendants assumes that from now on the pattern of the distribution in the motion picture industry is fixed to the extent that there are not going to be new distributors of quality pictures outside of the eight defendants in this suit. Now, I say that that is just the kind of situation that cannot be accepted by the Court if it is going to actually effectuate a dissolution of this combination of these eight defendants to control distribution of pictures in this country.

Mr. Proskauer: Your Honors, I have studiously obeyed the admonition of Judge Hand not to strive for the last word here. I shall make no reference to the last remarks of Mr. Wright. I think we have argued that back and forth here to an extent which has tried the patience of the Court.

I want to make an observation about this retention of jurisdiction clause, however, because I think that is vital.

Mr. Wright always finds in our conduct a searching for immunity. Now just look at his section 7 on page 22. He

(4298)

retains jurisdiction of the cause only for the purpose sub-

stantially of enforcing the decree or punishing violations thereof.

On Tuesday Judge Hand observed that this was a tremendously more complicated industry than any that had ever come before a court. These discussions here for the last three days indicate that nobody should have the hardihood to say that what is done here now necessarily has finality in the sense that experience won't show that there should be a change.

Now, how in God's name have we sought to get immunity when we ask this Court to retain jurisdiction to enable the plaintiff or any defendant to take further proceedings in the event it should appear that the operation of this decree has failed to bring about a correction of the found violations of the Sherman Law?

(4299)

Mr. Proskauer: We haven't asked your Honors to say that we are the only ones who can come in. We have submitted ourselves in what we propose here—

Mr. Wright: You want an answer to that question, your Honor?

Judge Hand: Yes.

Mr. Wright: The difference between our proposal and theirs is this: anyone can come in under this proposal, "Jurisdiction of this cause is retained for the purpose of enabling any of the parties to the decree to apply to the Court at any time for such orders or directions as may be necessary or appropriate for the construction or carrying out of the same," that is, this decree.

Now we haven't attempted to limit in advance what the Court can consider on the petition of any party as an appropriate ground for modification. But the purpose of the modification is always the construction or carrying out or enforcement of the decree.

Now they are suggesting that they might wish to come in and they want to have it stated in advance simply as a means for getting out from under the decree if it appears that it becomes more burdensome than they think it would

be. I don't think that is a reason, a sound reason for including—

Judge Hand: We think your clause "or for other or further relief" doesn't cover it.

(4300)

Mr. Wright: Their standards in my view represent a considerably more favorable position than they could possibly derive by applying adjudicated cases to the construction of our words "or for other or further relief."

I think the safe way to handle it is—you have here the language, "or for other or further relief," and if anybody makes an application he is entitled to get whatever relief he can show he is entitled to under whatever authorities he can then muster, rather than by some prestatd set of standards that he thinks are going to help.

Mr. Proskauer: May I say, Mr. Wright's interruption has not tended to clarify this situation. His language of the retention section relates solely to construction and enforcement. There is not a word in his section that relates to modification in the language which has been told you by Mr. Caskey was taken from the Appalachian case. If there is an issue between us here, let's face it. We ask this Court to retain jurisdiction practically for all purposes. We do it because nobody is omniscient. We do it because as these complicated provisions of this decree get into action it may well be that the Government can come in and say, "This has
(4301)

not done the job." We are willing to subject ourselves to that under this form, or it may well be that we can come in and say there is something here which obviously creates an inequity and we ask your Honors to do exactly what the Court said in the Appalachian case, a District Court ought to reserve jurisdiction to do.

Now the only thing I have heard which gives any pause at all—and I don't think it is really pause—is the suggestion that possibly the words "or for other or further relief" may cover these things. I don't think they do, your Honors, and I believe we should have with the Government the clear right to come into this court in a situation as complicated as this

and show—not relief from things occasioned—shall I proceed, Judge, or wait?

Judge Hand: Well, I had in my mind—I didn't hammer it out—I really had in my mind if this thing became impracticable as a means of controlling your monopolizing tendencies, that the Government could come in and make another application and say that there must be divestiture or something else. I had that in mind.

Mr. Proskauer: That is what this says.

Judge Hand: I am rather surprised that Mr. Wright should raise this question. You might have raised it.

Mr. Wright: We ourselves, if the Court please, suggested, (4302)

of course, specific reconsideration after specific periods of certain provisions by the Court. But if the decree is going to have finality at all, I think it must not open up every provision of the decree the way in which this Section 11 seeks to open.

Judge Hand: Are you afraid you could not appeal from it because it is not final?

Mr. Wright: Whether or not it would have finality for those purposes I don't think there is a serious question. I think it probably would.

Judge Hand: We shan't lightly disturb any such decree. You would have to show something on either side that was very controlling.

Mr. Wright: Yes.

Judge Hand: In other words, we don't any of us, I suppose,—and certainly I don't above almost all other men—pay very much attention to rearguments after I once crystallize. I used to, but I found it did a great deal more harm than good. I find that it was a terrible practice, a weakness. And we have always here tried to differ very fundamentally from the various courts in the west in which a decision is only a step in talk and other decisions that go on for years. And in the reports you generally see both opinions printed as to what they thought of their first decision and what they

(4303)

thought after the second and so on: I don't believe in that and I don't think it is sensible or practical. It is not because I don't very often doubt my own conclusions and decisions, but having decided how to jump after more dubitation than is in the heads of most men, I don't intend to recant until somebody has told me I must who is superior.

Mr. Wright: I take it what we were concerned with in Section 7 is not any recantation at all, but the circumstances under which at some later time reconsideration might be had. For our part we would much prefer to take our chances under that provision than we would under the provision that they have proceeded under in their Section 9.

Mr. Proskauer: May I proceed very briefly along the lines you indicated?

Judge Hand: Yes.

Mr. Proskauer: This is a judgment against us and you are going to orient in this decree a procedure for curing these evils of which we have been found guilty. I don't want any reargument. I don't want anything but for you to keep jurisdiction over this case so that if by reason of what transpires after the decree it becomes apparent to you either that the Government should have greater relief than you gave

(4304)

it or that we should have some modification of the relief you gave it—not that they are going to get it or we are going to get it—but that you have the jurisdiction to entertain an application. Now that is all we are asking and unless we all claim omniscience here, I should think Mr. Wright would agree with us that that was a sensible thing in the public interest to do in a great and complicated industry like this.

Now I sense what is in Mr. Wright's strategy. He wants to go to the Supreme Court and argue that he should have divestiture and that this does not give it to him and he doesn't want to have it said that this Court acted reasonably in retaining jurisdiction, and he believes his chances of reversing this Court on appeal are less if you do what the Supreme Court said in the Appalachian case should be done.

—that when you are dealing with a continuous and complicated situation you should retain jurisdiction.

I don't want to prolong the argument at this hour. I commend that to your Honors as something fundamental and serious and the language of it I ask that your Honors take and consider what is the right and the decent thing to do here.

Now Mr. Wright, may I proceed just a few minutes with-
(4305)

out interruptions? I don't mind them when they are relevant, but I don't hear many relevant ones. And when I say this my lips are going to be closed on this decree because it would be just repetition.

I am going now to the last provision about the effect of what is to be done with this consent decree.

There again I argued that this morning in connection with my argument on arbitration. Mr. Wright replied to it. Now we have got the whole thing thrown into the hopper again. I restate my position, your Honors. The consent decree is the judgment of this Court. It remains in full force and effect except as you choose to modify it. Nobody has ever questioned it. The cases have questioned the right of a court to modify a consent decree, but nobody has ever questioned the fact that the consent decree was a judgment of the court, and we ask that language because it gives vitality and basic root for our contention with respect to these arbitration provisions.

(4306)

And when Mr. Wright said to me this morning that I was misrepresenting him when I said that they wanted to throw the arbitration in the ashcan, I call your Honor's attention in support of that statement to the very provisions he has been arguing here for about the liquidation of the whole arbitration system.

Judge Hand: You don't any of you care for any more discussion of this case before it is finally submitted for a decree?

Mr. Proskauer: I think not, your Honor, as far as I am concerned. I can't speak for all my colleagues.

Mr. Raftery: I only would like to have a few days to submit that proposed decree.

Judge Hand: Yes.

Mr. Raftery: I will get it in.

Judge Hand: And Mr. Isseks.

Mr. Cooke: I would also like to submit a decree on behalf of Universal.

Judge Hand: All right.

Mr. Leisure: How long a time will we have to submit something on road shows? What period of time?

Judge Hand: Oh, ten days.

Mr. Leisure: Ten days. Thank you. On the findings?

Judge Hand: Yes. That is for Mr. Raftery, too.

(4307)

Mr. Raftery: That will be fine.

Judge Hand: And Mr. Isseks—any of you. You have ten days.

Mr. Leisure: On the findings of fact and conclusions of law I assume you want no discussion on that?

Judge Hand: On the findings of fact and conclusions of law and the proposed decree. I should think this discussion of the proposed decree covered all this minutia as to findings.

Mr. Proskauer: With just one exception.

Judge Hand: It seems to me if you are going into all these findings it will just take forever and we will probably forget.

Mr. Proskauer: Being in entire agreement with your Honor's suggestion, as far as we on this side of the table are concerned, I don't see any advantage of going over the findings. I just want to call attention to one fundamental thing, and that is that the Government has omitted from its proposed findings everything that was said or found in our favor. That is why we have a great deal more findings than the Government.

Mr. Frohlich: I don't think it necessary for Columbia to submit a decree. Whatever changes are to be made can either be made by changes in the Government's decree or in the (4308).

Court's own decree. I don't want to burden the Court with too many documents.

Mr. Seymour: We have certain changes for Paramount. May we arrange with your secretary?

Judge Hand: Yes. There is such a multitude of paper we may never be able to determine which should be first and which should be last.

Mr. Seymour: I just want to add one word with regard to the findings. As Judge Proskauer has said they contain many which were left out in the Government's findings because they were favorable to the defendants. Second, our findings are consistent with the opinion, follow the Court's opinion, and the Government's are directly inconsistent in many respects with the opinion.

And finally we didn't propose in that blue book any findings with respect to the limited divestiture phase in the decree, and that was because until we knew how your Honors wanted the decree, to deal with that subject it was pretty difficult.

Judge Hand: Wait a minute. What is that?

Mr. Seymour: In our proposed findings in the blue book there are no findings which relate to the portion of the decree which is subsection (4) of subdivision (3), that is the limited divestiture section. Now would this proper procedure: When your Honors get to that point of the decree to decide what you are going to do with Section 4, if we could get advice from the Court informally, both sides, as to what those provisions are to be, and then we will submit the appropriate findings rather than burden you otherwise.

Judge Hand: Yes, I think you better do it now. Submit anything you want.

Mr. Seymour: May we have a few days on that?

Judge Hand: Oh, yes. Ten days for everybody.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Equity 87-273

UNITED STATES OF AMERICA, Plaintiff,

vs.

PARAMOUNT PICTURES, INC., et al., Defendants

I, William V. Connell, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties. (Vols. 1 to 7 inc. of printed testimony.)

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 6th day of May in the year of our Lord one thousand nine hundred and forty-seven and of the Independence of the said United States the one hundred and seventy-first.

William V. Connell, Clerk. (Seal.)

United States District Court**SOUTHERN DISTRICT OF NEW YORK****UNITED STATES OF AMERICA,***Petitioner,**vs.***PARAMOUNT PICTURES, INC., et al.,***Defendants.***Equity
No. 87-273.****Before:****HON. AUGUSTUS N. HAND, C. J.,****HON. HENRY W. GODDARD, D. J., and****HON. JOHN BRIGHT, D. J.,****Constituting a Statutory Court.****New York, January 22, 1947;
10.30 o'clock a. m.****APPEARANCES:****For the Government:****JOHN F. X. MCGOHEY, Esq., United States Attorney,****By Robert L. Wright, Esq.,****Philip Marcus, Esq.,****John R. Neisley, Esq.,****Curtin Shears, Esq.,****Elliott H. Moyer, Esq.,****Special Assistant to the Attorney General;****Harold Lasser, Esq.,****Horace T. Morrison, Esq.,****Special Attorneys.****(2)****SIMPSON, THACHER & BARTLETT, Esqrs.,****Attorneys for Paramount Pictures, Inc., et al.;****Whitney N. Seymour, Esq.,****Austin C. Keough, Esq.,****Louis Phillips, Esq., and****Albert C. Bickford, Esq., of Counsel.**

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HERMAN LEVY, Esq.,

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SULZBERGER & SULZBERGER, Esqrs.,

Attorneys for certain stockholders owning 50
percent interest in a single theatre operated by
Loews;

Myron Sulzberger, Jr., Esq., of Counsel.

(4)

The Clerk: In the matter of the motion of the five majors
in United States of America against Paramount Pictures,
Inc., et al.

Mr. Donovan: If the Court please, the motion before your Honors was to amend the decree filed by this Court on Christmas Eve.

To amend that decree for RKO I respectfully ask the Court to conform the decree to the opinion of the Court in this case by adding language which will make paragraph 6 of section III read as follows:

"From expanding its present theatre holdings in any manner whatsoever except as permitted in the preceding paragraph; or except for the purpose of acquiring theatres or interests therein in order to protect its investments or in order to enter a competitive field, if such defendant shall show to the satisfaction of the Court and the Court shall first find that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures. Reasonable notice of the intention to make any such acquisition shall be served upon the Attorney General and the plaintiff shall be given an opportunity to be heard with respect thereto before any such acquisition shall be approved by the Court."

Your Honors will observe that the language follows very (5)

closely the language of your Honors in outlining the terms of the decree on page 65 of your opinion, because there it was said that the decree to be entered—and now I quote your language—"shall not prevent a defendant from acquiring theatres or interests therein in order to protect its investments or in order to enter a competitive field; if in the latter case, this Court or other competent authority shall approve the acquisition after due application is made therefor."

In fact, our proposed language is more restrictive because it applies to any expansion.

Now, that position, your Honors, that you took in that paragraph had already been foreshadowed by what your Honors said on page 60—and I quote:

"The remedy we are giving against the infractions is certainly no more drastic in effect than the one the Supreme Court granted in Interstate Circuit, nor more severe than the one it imposed in United States v. Crescent Amusement Co."

It is true, your Honors, that if this language should be added it would make the remedy in this case conform very closely or almost exactly as in the Crescent case. And as I read the Crescent case, your Honors, it would appear that the essence of that case was theatre expansion by unlawful means, and the Court there found that there had been an unlawful monopoly established in the operation of theatres (6)

in various States of the South, and in addition it found that there had been coercion or attempted coercion upon independents for the turning over of their theatres. But even in those circumstances and with those findings the Government requested and the Court approved a provision prohibiting expansion—and now I quote from the opinion of Justice Douglas—"except after an affirmative showing that such acquisitions will not unreasonably restrain competition."

In pointing out the considerations which governed the Court in the formulation of such a decree, the Supreme Court used this language:

"The growth of this combine has been the result of predatory practices condemned by the Sherman Act. The object of the conspiracy was the destruction or absorption of competitors. It was successful in that endeavor. The pattern of past conduct is not easily forsaken. Where the proclivity for unlawful activity has been as manifest as here, the decree should operate as an effective deterrent to a repetition of the unlawful conduct and yet not stand as a barrier to healthy growth on a competitive basis. . ."

Now, within the principle laid down by your Honors, it seemed to us only fair that the same opportunity should be

given to RKO and to the defendants here as was given the
(7)

defendants in the Crescent case, particularly since there is no finding here of any unlawful monopoly such as was established in the Crescent case, and there is no finding of coercion such as was established there. The contrary has been found by the Court in this case: First, that the organization of RKO increased competition in every branch of industry; second, that RKO achieved no monopoly of theatres individually or collectively, considering it with the theatres of the other defendants; and the basic finding of this Court was that the irregularities and restraints arose not from the ownership of theatres by the producer-distributors, but in the trade practices and in the joint ownership and joint operations referred to and enumerated in Finding 154.

Now, if it please the Court, as I read your Honor's opinion, it seemed to me that the underlying philosophy in the approach to a remedy was in the necessity, as your Honors expressed it, on page 60, of restoring competition to the moving picture industry that would be fair both to the competitors and to the public; and that the best way of dealing with it was by the abatement of these trade practices rather than by total divestiture.

Now, your Honors, if this decree can be construed to mean absolute prohibition of expansion regardless of circumstances, then I am advised by my client that RKO would
(8)

be in an impossible competitive position. And there are a few specific facts that need to be considered. There are certain findings based upon the testimony of Mr. Rathvon, president of RKO, which tend to show that RKO had always endeavored to operate its theatres as showcases for the initial exploitation of its features, of the features it distributes, with the result that the advertising by reason of that exploitation meant the increase of revenue to all who exhibited those pictures.

Of course RKO is not in a position to take advantage of that situation because she has no theatres in the South

except in New Orleans, none in the Southwest, none in the Northwest, and only two in California. And more than that, your Honors, out of the 19 years of its existence, seven of those years were spent in receivership in which she lost many theatres.

I think your paragraph 118 of the Findings shows that while RKO had 109 theatres, Paramount had 1,395, Fox 636, Warner 501, and Loew 135. At the trial RKO had 106 theatres. Today she has 102. And without applying further to the Court for relief, she will have somewhere between 80 and 85 left of which she owns only 32 in fee.

Now, if it please the Court, in view of that situation, if RKO is to be locked into a position where she cannot get

(9)
that healthy growth that was spoken of in the Crescent case, and which was the basic purpose of your Honors in the opinion, then she will be subjected to a kind of a progressive divestiture which will mean slow strangulation for her; and I respectfully submit that the public interest would be fully safeguarded by giving to RKO and to these other defendants the same relief which was given in the Crescent case, so that expansion could be prohibited except where there is an affirmative showing that such acquisition would not unreasonably restrain competition; and I suggest, your Honors, that if there is to be such a fixed determination in the prohibition of expansion, that then not only will the purpose of the Sherman Act be defeated but also the purpose of your Honors' decision.

Mr. Seymour: May it please the Court, I want to add a few words on behalf of Paramount with respect to this same portion of the motion.

The decree as promulgated by your Honors may be ambiguous as to what you intended with respect to theatre expansion. As one reads paragraph 5 with paragraph 6, it seems probable that your Honors were following your opinion in that decree and were providing not absolutely against expansion but only against expansion where more than 5

percent but less than 95 percent interests were acquired. So
(9a)

one may read the first sentence of paragraph 5. But in view of the very strict language of paragraph 6 of subdivision 3, we felt it desirable to come back to your Honors for clarification at this time so that there could be no misunderstanding about what the decree meant.

(10)

Now General Donovan has referred to the opinion which indicates that you did not intend to ban expansion absolutely but recognized the propriety of acquisitions to protect investments and theatre expansion, or the acquisition of theatres to enter a new competitive field; and in your opinion you indicated that the latter should involve court approval.

The language of the opinion, when we came to the argument on the decree seemed to be quite clearly what your Honors had definitely determined because in examining the colloquy I am reminded as we set forth in our little memorandum that we filed yesterday that when I was arguing against the Government's absolute ban on expansion and began to attack that as contrary to the opinion, Judge Hand said, "We are not going to have any such drastic opinion as that. We considered that." And naturally I passed on because that seemed to be precisely in accordance with the opinion, and I took it that your Honors had rejected the Government's suggestion.

Now the findings and conclusions, like the findings and like the colloquy, point not to a complete ban on expansion but point only to the divestiture of those joint interests which your Honors held to be unlawful and there is nothing in the
(11)

findings or in the conclusions to support an absolute ban on any theatre acquisition.

In our proposed clarification we have gone even farther than your Honors went in your opinion. In the opinion the Court indicated it would be content with a decree which re-

quired court approval only when the acquisition was for the purpose of acquiring a theatre in a competitive field. It did not require court approval where a theatre was acquired in order to protect investments. In our proposed clarification we have provided for court approval for both. Not only did we think that was consistent with everything that happened in this case to have this clarification in substantially the form suggested, but to read the decree as intending to ban absolutely any theatre acquisitions in the way of an expansion to protect investments or to enter a competitive field would go beyond, we think, relief which has been authorized even in more extreme cases.

General Donovan has pointed out that in the Crescent case, with all the Sherman Act violations which the court found there, the Supreme Court directed a decree which permitted acquisition upon court approval and recognized that (12)

that did not impose an undue burden on the court. In the Schine decree, where, as Judge Bright recognized, the facts went far beyond any facts in this case, the same right of acquisition with court approval was allowed in the decree.

If these defendant-exhibitors should be denied the right upon a proper showing and court approval to expand, then your Honors' holding that they had a lawful right to own theatres would be substantially negated because it is surely a part of the right to own theatres to protect your investments, and it is surely a part of the recognition which your Honors gave to the public interest in the ownership of theatres, the public advantage in these fine large theatres, that these defendants should be allowed to enter a new competitive field.

Now they might have been allowed to do that without any application to the Court, merely being restrained by the requirements of law. But surely with approval of the Court, so that any acquisition in either of those fields may clearly involve no undue or unreasonable restraint of trade, they should be entitled to do it, and indeed to deny them that right

would be to relegate them to a class in the community where everybody else can do this and they can't, though they have not been found guilty of violation in theatre expansion or

(13)

acquisition except in regard to joint interests, which of course are forbidden.

Now I shan't labor the importance of the right to protect investments or to enter a competitive field, because your Honors have recognized that without any guidance from us in your opinion, and reiterated it in the colloquy, and seem to have recognized it in the findings. But plainly, there are many situations in which a theatre-owning defendant must be free with court approval to take action to protect its theatre investment.

Let me give—and I don't attempt to exhaust them—a couple of examples which show the kind of thing which they surely must be free to do with court approval under the opinion.

U. N. is about to build a magnificent part of the City on the East River. It seems probable that a part of that will be a theatre section. No one can say now whether it will draw substantial patronage from the Times Square area and as congestion and transportation in New York City gets worse it probably will.

Now Paramount owns a fine theatre in the Times Square area. Surely if there should be a substantial migration of

(14)
theatre patronage to that new section of New York, Paramount ought to be free to come to your Honors and ask leave to acquire a theatre there to protect its investment.

There are situations where the business section of the City moves from an old area to a new area. Surely the owner of a theatre in the old area ought to be able to come to the Court and get the right to erect a new theatre to protect its investment in the old theatre from diversion of patronage.

Another example which is perhaps not of great general interest but of some interest is this: Open air theatres have

become more and more common. These so-called drive-in theatres. Surely if that movement shall spread, Paramount, owning a theatre in the community and finding that during the summer months a substantial portion of the patronage was taken away, ought to be free to come to court and get leave to acquire a drive-in theatre or an outdoor theatre.

Now those are just examples of the kind of thing that might be necessary to protect investments.

Now on the entry into the competitive field, as I say, it was a public advantage and the Sherman Act recognizes that it is a public advantage to have competition in exhibition, and that it was a public advantage to have competition in (15)

exhibition from these defendants. Now there are areas where these defendants have no theatres where it is not a public advantage to have that competition. The Sherman Act does not take that view and your Honors didn't seem to. Your Honors knew that there are areas where, for example, Paramount has no interests or theatre interests, and the exhibitors have boycotted pictures and denied the exhibitor an opportunity to exhibit pictures. That is a public disadvantage and of course it is a serious disadvantage to the distributors, and surely Paramount and the other defendants ought to be free to go into such an area and compete and assure an outlet for their pictures and an opportunity to the public to see their pictures.

That boycott situation is not the only one where such an opportunity ought to be afforded.

Now I submit to your Honors that the decree should be clarified so as to conform to everything your Honors have said in this case which indicates that your Honors have recognized the propriety of leaving some flexibility in the future development of this business and not denying these defendants the lawful rights which they were held by your Honors to have, to-wit, the right of owning theatres and (16)

exhibiting pictures; and we submit to grant this clarification

will simply put the decree in clear harmony with everything your Honors have done in this case, and not to grant this clarification will put the decree out of harmony with everything your Honors have done in this case and out of harmony with the current course of recent Supreme Court decisions on relief.

Judge Hand: Now Mr. Seymour, we in drawing up this decree—and it was in the opinion—reserved jurisdiction. That is at once a benefit and a danger to anybody connected with the business, of course. In other words, if it doesn't work you are at liberty to divest on further hearings and if this arrangement bears too hard on any theatres in any given situation you can still come to court and ask to modify where the specific right to modify in this respect was not preserved.

Mr. Seymour: Your Honor is aware of the difficulties with applications to modify under the general reservations. Now we submit that there should be a specific reservation in this regard as your opinion foreshadowed, and also the discussion foreshadowed, so that it may be plain to whomever might be hearing the case at the time that your Honors specifically reserved the right to come in with such applications.

(17)

Judge Hand: Does anyone else want to be heard on this clause that General Donovan and Mr. Seymour have been talking about?

Mr. Caskey: Not on this reservation.

Judge Hand: All right, that being so—

Mr. Arnold: I would like, if the Court please, to address a few remarks to the effect of this acquisition on expansion, or the effect of expansion upon our clients, the purpose of which is to suggest a possible reconsideration of our right to intervene.

Our clients represent every sort of situation. For example, many of them would be affected—are affected by subsection 4 on page 6 of the decree, the section which restrains the defendants from making or continuing leases of theatres.

in the same competitive area to an independent for a share of the profits.

Now they haven't seen this motion. I don't know what position they would take under the motion, but I suspect that many of them would take this sort of position: as the decree now stands, a lessee from a major under a profit-sharing arrangement can change that lease I assume to a fixed rental but the major cannot expand by taking over the operation of that theatre itself. Now here is a section of the (18)

decree which goes further than our original grounds for intervention in that it takes away a specific property right and here is a motion for expansion which takes away all bargaining power when that property right is affected, when that lease is cancelled.

Now I assert that the Court cannot consider this motion until it has given notice to those in our situation whose property rights will be affected. They have, I think, a clear position as necessary parties with respect to this motion. I haven't contacted them. It is difficult to explain this thing over the long distance phone but I do want here in protection of the various members I represent to suggest that as the decree now reads they have the right in the situations covered by section 4 to change a profit-sharing rental into a fixed rental, the expansion will permit the major to take that over in order to protect his own investments, and their property rights, specific lease property rights, would be adversely affected, and therefore, while I can't take a position on the motion I suggest the Court has no jurisdiction to grant that motion without notice and without a hearing, and I wish to point out again the effect which this motion might have with respect to competitive bidding.

(19)

Judge Bright: That was the only ground you asked to intervene on?

Mr. Arnold: That was the only ground on which I asked to intervene, but now a new motion is made which our clients

have never seen, which affects specific property rights. Of course we claim no right to intervene until such time as our specific property rights are affected. I am not here doing anything more than in the interests of my clients suggesting until we have an opportunity to intervene on this new motion the Court should not pass on it, and I further suggest that we are necessary parties with respect to any motion which affects our leases. I can't tell the Court who these people would be; I am simply making a record to protect their interests if any.

I wish to say further with respect to the effect of expansion on competitive bidding, the situation we can imagine might be this: a group of independents are in any given city buying their pictures on competitive bidding from one of the majors. The major puts a minimum bid of \$5000 a picture on. No one is able to bid for the picture. The suggestion is always there that that is a boycott and that they can now come in and build a theatre in order to protect their pictures and in order to expand their own competitive situation. (20)

That, if the Court please, is exactly what will happen, the threat of the building of a new theatre, the pressure—you see, we start out with a seller's market, and on top of that seller's market there is the pressure of a possible new theatre coming in. I suggest that that is one of the things which should be taken into consideration with respect to the operation of the beginnings of competitive bidding and expansion. I quite agree that my only right here is to talk in this connection about competitive bidding. I have no right to talk about expansion except insofar as it affects competitive bidding, and I think I have the right to point that out. And then one final thing and I am through; and that is, I would like to call the Court's attention to the fact that since this decree has been handed down there are a number of events and actual evidence which could be produced to show that the Court should give reconsideration to its competitive bidding proposal. I think it would be presumptuous for me

to repeat that which the Court heard very courteously and at great length on competitive bidding, but I think it is proper for me to outline a few situations which have developed since the Court entered its decree, and suggest the proof would be available of that character.

(21)

Since the decree old customers' relationships and franchises are being cancelled and repudiated from Massachusetts to New Mexico. And I think we could show that this competitive bidding scheme is becoming the greatest bonanza to the majors that they ever have had in the history because of the bargaining position in which it would put them. We argued that before. The only thing I add now is that we offer to show the thing in actual operation.

Now I will give a typical situation to show how that is working. In one city an old customer relationship which has lasted for fifteen years has been broken, and the picture, a major and most important picture has been sold to another major defendant.

(22)

Now, I think that instances like that would build up the picture of the piecemeal destruction of a competitive system by legalized operations one by one under a decree which prevents the Court or any other court from looking at the entire situation and seeing where the practice of competitive bidding is leading.

I will use one analogy and then I am through. It is an analogy in reverse. The A. & P. Stores have been recently convicted of violation of the Antitrust Laws. Their policy was to go into town after town and accumulate retail outlets. Their money was made behind the retail outlets. Their methods of getting retail outlets would be to indulge in fierce competition in a given town until their outlets were established and competition was destroyed. I think that in no single town could it have been shown that the A. & P. had violated the Antitrust Laws. The Court, however, was able to look at the entire acquisitions of A. & P. and they were convicted of violation of the Antitrust Laws.

Now, I think that the practices since the decree would show a pattern of that character taking place in the operation of competitive bidding, and it is that new matter only which I wish to call to the attention of the Court.

Judge Goddard: Judge Arnold, are you opposed to giving the exhibitor the option of competitive bidding?

(23)

Mr. Arnold: The option, if the Court please, is purely illusory. He does not have any option. He is compelled in a competitive situation, if one man makes a bid, to come in. In other words, the Court, it seems to me, has effectively allowed a combination of major defendants to impose this on the market. I do not want to go into that too much; I do not want to repeat all the arguments I made before. That, of course, has been our position. I do not think that the decree has substantially changed it at all.

Mr. Proskauer: May it please your Honors, I just have a word to say. I do not want to go far afield with Judge Arnold. We are not here on our motion on this competitive system, and I would not have got up if it had not been for his suggestion that in some sinister way we were using this decree for the purpose of coercing his clients.

I suggest the impropriety of such a representation to this Court, and I ask your Honors to consider the improbability of such a thing in the light of the fact that we are coming here with a motion, a part of which is to be submitted to you by and by asking for a stay of these provisions for the very reason that we do not want to go through with this change of system which does bring hardship in its wake—I

(24)

admit—to us and to everybody else until we get reoriented. This talk about competitive bidding giving us an option to coerce independents by our own collective action has no substance whatever, and I am suggesting that the determination of this motion we have made should not be influenced by the somewhat atmospheric observations of my friend Judge Arnold.

I should like to say a word about Judge Hand's suggestion made to Mr. Whitney Seymour, and that was that perhaps we could get this relief as to the theatre situation by coming in under the general power of amendment section of the decree. I should like to point out the great differences between coming into court and saying we are here by virtue of a provision of the decree, asking permission to do a thing where we have got the burden and must sustain the burden of showing that we are not violating the law by doing it—that on the one hand—and on the other hand coming into a court and saying we want the decree itself modified. That burden is too great to impose on us in a practical situation like this where you will probably have from time to time perhaps six, seven, perhaps a dozen applications a year from one company or another to acquire a theatre under circumstances which it undertakes to show to the Court are perfectly proper, and the Court might very well and probably

(25)

would say in many of those cases we think you have sustained that burden and we will permit you to acquire theatre A, where a court would be wholly unwilling to say that on this showing we are going to modify the decree. The troubling part of this wholly surprising provision in your Honor's decree was that it was completely unforeshadowed. You had in your opinion, as was pointed out, very carefully envisaged the validity of these situations in which we want to expand theatre ownership. You had in colloquy expressly said that you would not put such a drastic provision in the decree. Therefore why is not the thing to do to make this decree conform with the necessities of the case, as your Honor yourselves noted them, and merely put in a provision that we are entitled to come here and take the burden of showing you that we should be entitled to acquire a theatre under specific circumstances?

Judge Hand: Mr. Wright.

Mr. Wright: If the Court please, I do not propose to make an argument here. I assumed that the time for

argument over the provisions of the decree were covered last October, in view of the extraordinary length of time that was given everyone to have his say about the decree prior to that date. I merely want to say with respect to this prohibition (26)

against expansion that in so far as the Government is concerned, its meaning is perfectly clear that there shall be no expansion except such expansion as might occur pursuant to an order entered by this Court approving an acquisition in the course of dissolving an existing joint relationship.

Now, that, it seems to me, is what the provision clearly said, but if it does not mean what it said, I think the Court ought to say so now.

There has been some inadvertent misrepresentation here, I think, of what the colloquy was and what these other similar provisions in the Crescent and Schine decrees provided that I think should also be cleared up. The provision you entered was a compromise between the position that we advocated and what the defendants advocated. We asked for an unqualified prohibition against expansion, and that was the request to which your Honors' remarks that were quoted by Mr. Seymour were directed. We did not get that. The defendants have an express authorization to expand in the course of acquiring these partnership interests. They also have, as I understand the decree, a much more flexible position than that which was actually accorded to either the Schine or the Crescent defendants. Those decrees, in terms, prohibit any acquisition except with the Court approval. Schine at this moment has a petition pending for leave to (27)

build a theatre to replace one which was burned down.

Now, the prohibition here is not in terms a prohibition against acquisition but one against expansion; so I should suppose without any court proceeding whatsoever these defendants are free to replace such existing facilities as they lose or abandon.

Now, I had assumed that one purpose—

Judge Hand: Repeat that last thing.

Mr. Wright: Will you please read that.

(Last remarks of Mr. Wright read.)

Mr. Wright: In prohibiting expansion except in the course of this dissolution proceeding pursuant to Court approval, I should suppose that one of the things the Court had in mind was preventing any substance being given to exactly the sort of claim that Mr. Arnold said some exhibitors were now making with respect to the probable effect of the competitive bidding system. I should suppose that the prohibition in its present form is, of course, intended to see that the operation of that system or other practices of the defendants would not be used as a means of promoting the over-all theatre position of the defendants.

Now, I think it is perfectly clear that where the Court has found, as it did here, that there has been an attempt to
(28)

monopolize, even though the monopoly has not been made effective, it is clearly entitled to adopt adequate measures to see what monopolization does not in fact result; and I think in accordance with the existing findings of the Court it was clearly authorized to go further than it did, and that is unqualifiedly prohibit expansion of the theatre holdings of these groups that have been found guilty of the violations which are recited in the findings. It did not do that, and it seems to me that the exception that was provided—that is, permitting these people to actually expand at the expense of independent partners—was an extremely liberal exception which, under no circumstances, ought to be broadened. If the Court, however, has any intention of broadening it, I do not think the matter should be deferred to some future application. I think we ought to know now what the actual intention of the Court is in that respect. I assume that its intentions are actually reflected in the provision as written; but if I am incorrect in that, I think we ought to know now.

Mr. Sulzberger: Your Honors, I represent certain stockholders who own a 50 percent interest in a single theatre presently operated by Loew's. We are vitally affected by (29)

the provisions of this decree, especially those provisions which involve the sale to or the purchase of that stock interest to Loew's. There are probably hundreds of similar individuals in a similar situation. We feel that it is impossible for this Court to envisage every situation where an independent or an investor is going to be vitally affected by a provision of this particular decree, and it seems fair to us that before this decree is put in final form wherein a modification of the decree will have to be applied for on notice to all the defendants, which would be an expensive procedure for a single theatre owner or a stockholder who owns an interest in a single theatre,—that your Honors provide by publication or other adequate means that all persons who will be vitally affected by this particular decree, and who may lose substantial sums as a result of the provisions of this particular decree, be given an opportunity to come in and to be heard so that they may present to this Court ways in which their financial interest is being adversely affected by the decree so that the same may be clarified now.

Now, in our particular case—and I do not want to burden the Court at this particular time with that individual situation— (30)

my clients own a 50 percent stock interest in a single theatre. I do not think that they would be classed by this Court as either independents or theatre operators, though it might very well be that the Court could or would come to such a conclusion. This particular person may be required under the provisions of that decree to sell its stock interest, though it may not prefer to do so, or to buy when perhaps it is not in a position to buy the stock interest of Loew's in that particular theatre. This particular stockholder, if it should buy, or, rather, if it should sell, is going to be vitally affected by that particular provision of the

decree which provides that a theatre is not a defendant's own theatre unless it owns 95 percent or more of the stock interest in that particular theatre. And there are many provisions in this particular decree which affect independents and investors in a way not envisaged either by the Court or by the Government. And in concluding I would like to say for my own clients and for independents generally that we would like an opportunity to present to this Court suggestions with reference to the decree before it becomes finally operative.

Mr. Davis: If your Honors please, I do not know what the situation is to which Mr. Sulzberger refers. I do not want to be understood as opposing to his attitude as a
(31)

co-stockholder with Loew's. It is not clear to me how the Court can sit here day-in day-out and pass on the equities of everyone of this multiplied number of instances.

Judge Hand: Of course we cannot, and we are not going to either. We are going to allow them to ventilate their ideas, but the idea that we cannot make a decree against some defendants in an equity suit under the Sherman Act without bringing in stockholders and everybody else, has been exploded by a number of authorities, and we dealt with it in the decree, and we do not propose to follow that trail much further even by listening to vocal exercises.

Mr. Davis: Well, I do not find myself in dissent with the Court. I want to make it clear, however, that I am not speaking in opposition to Mr. Sulzberger or Mr. Sulzberger's clients.

Now, I have not said anything on this question of expansion because I am content with what my colleagues have said on that subject. It does seem to me that a hard and fast rule, no expansion whatever, which freezes the present holdings of the parties, is apt to work more hardship than it is public benefit, and the question which we present there is whether the Court follows the language of its opinion, or

(32)

whether it follows the more restricted language of the decree. The opinion seemed to use to leave a proper degree of latitude, and we think the decree should preserve it.

Now, on the question of competitive bidding, still a very contentious subject, as one may perceive from the remarks of my brother Arnold, what we suggest in that connection is this, that the operation of that system, experimental as we all know it to be, should be suspended until reasonable time, 90 days or whatever, after the entry of final decree in this case if and when an appeal should be taken. If no appeal is to be taken by any of the parties and the case ends here, then we know what to do. If an appeal is to be taken, we submit that this rather expensive and experimental process should await the final determination of the case so that we would not be put in the attitude of beginning it today and dropping it again tomorrow. We should like the case to reach a stage of finality before we are compelled to enter upon that experiment and we so suggest.

When it comes to the dissolution of pools, your Honors have provided that joint ownership should be disposed of in two years. You set no time whatever for the dissolution of pools. We submit that the same sort of latitude in time should be extended to the dissolution of pools as to the dissolution of joint ownerships; because in essence the problems are very much the same and require the same sort of negotiation and readjustment to the interests of the parties; and we should like a time limit set on the dissolution of pools.

I am not disposed to argue this matter to any great extent. We have tried by our memorandum and our brief to give your Honors the exceptions we have to make for the moment to the decree, and I make it clear that this is not a proceeding on our part for a rehearing or a retrial of the case. It is to the interest of the public that there should be an end to litigation, I suppose, and we accept your Honors' opinion for present purposes. Our object is only

to bring the decree into conformity with that opinion and with the necessities of the parties.

Mr. Caskey: I might make a slight technical suggestion: We are not asking for any addition of time to dissolve the relationship between co-defendants to the extent that that has not already been accomplished. We propose to accomplish it by March 1st.

The requested provision for two years with regard to pools and leases are arrangements with independents and not as among ourselves.

With regard to the so-called competitive bidding, as far (34)

as the five theatre owning defendants are concerned, we are not asking for any stay with respect to provision 8(b) which requires that each license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers or otherwise; nor are we asking for any stay as to 8(d) which provides that each license shall be offered and taken theatre by theatre and picture by picture. That too it is contemplated will go into effect immediately. In fact, it is, generally speaking, in effect now. Nor are we asking for any stay from section 9 which provides that we are enjoined from arbitrarily refusing the demand of an exhibitor for the run that he desires and licensing it to another. Thus, your Honors will see that the essence of the reform is in effect, and what we are asking is that the precise procedure or ritual specified in section 8(a) and 8(c) shall not become effective until final disposition.

We are not asking for a postponement of the general plan which this Court has suggested, that licenses shall not be refused arbitrarily, that they shall be granted solely on the merits without discrimination theatre by theatre, picture by picture.

Judge Goddard: What about the admissions?

Mr. Caskey: We are not asking for any stay with regard (35)
to that. I think it is a fair statement to say that that pro-

vision has been taken out of most of the contracts of the five theatre-owning companies. I do not know what the others have done. I do know that in the case of Twentieth Century-Fox the provision was taken out as soon after June 11 as we could do it, and I think that generally speaking it has been taken out.

Judge Goddard: June 11?

Mr. Caskey: That was the date of the opinion. We took it out as soon as the opinion came down. And you may recall that we addressed a letter to the Court on this subject in the early summer of 1946, so I think as far as the five companies are concerned, the practice of fixing admission prices has been stopped.

Judge Hand: Of course, when it comes to the extra time you have asked for a stay, if there is an appeal you can go right down to Washington and try to get it.

Mr. Caskey: Yes, but it must be clear to your Honors that this is the appropriate forum for the stay, and I think on consideration you will see that the two-year period should have applied. I think it is merely a matter of mechanics; if the paragraph had been renumbered it would have applied to all three. I do not think there is any essential difference between a pool with an independent or a lease to an independent, (36)

pendent, or a joint stock ownership such as has been described by Mr. Sulzberger. They all fall into the prohibited category.

Mr. Seymour: May I just make a comment in answer to your Honor's suggestion that we could go to the Supreme Court for this stay on the competitive bidding thing. I think it is plain that the thing is so complex, the whole problem of distribution is so complex, and the question of whether this represents a real change which ought not to go into effect until it has been considered, is one which your Honors can appraise far better than the Supreme Court can on an actual motion. Now, it is plain that it is a revolutionary reform; that is what you intended it to be. Whether it can be made

plain to the Court on a motion for a stay, I do not know; and it seems to us that your Honors are in a far better position to pass on that than the Supreme Court would be on that application. This case will be complicated enough for the Supreme Court when it gets there on the merits, and this question of distribution and the change in distribution, it seems to me ought to go to them on the merits rather than on an application for a stay.

Mr. Proskauer: Your Honors, we are asking one other clarification in your decree, and it relates to a conclusion of law. As the decree is now drawn, that conclusion reads (37)

(9(d))—and if you look at page 11 of the little memorandum we handed you you can follow I think very clearly the rather simple argument I propose to make to you.

The conclusion reads:

“Conspiring with the distributor defendants”—

Mr. Wright: Excuse me, Judge. If you would rather hear me now on this question of the stay, or put the whole thing over—the order that you have been following I thought was to discuss one subject at a time.

Mr. Proskauer: Oh yes, I will gladly give way.

Mr. Wright: If you would rather do it this way, all right.

Mr. Proskauer: I waited to see if you were going to get up. I will give way.

Mr. Wright: With reference to the stay of the competitive bidding provisions of the decree, it seems to me quite clearly that is an integrated section. You can't, it seems to me, stay part of those provisions and have others operate effectively.

Now, for our purposes there are many situations of people who have been in communication with us which are contrary to the representations which have been made by many (38)

of these organizations here; they thought their particular situations would be helped when and if competitive bidding

went into effect. They, of course, have been advised that the effective date of the provisions will be July 1. In view of that fact, our inclination, I think, is to see that the provision is at least given an actual trial in operation; that you cannot determine whether all of these dire consequences will ensue, or what its actual effects will be without actual experience under it. The only way to get experience under it is to put it into effect.

Now, I have this qualification in that. I had assumed that serious consideration would not be given to motions to amend the substance of the judgment at this time; and if there were not this protection against affiliated theatre expansion along with it, I would have some qualms myself about seeing that it goes into effect without that protection; but as I assumed the matter will be now, I assumed that the judgment will stay in its present form, and under those circumstances it is very doubtful whether we will appeal from the competitive bidding provisions as such at all.

Now, nobody else has filed an appeal, and I do not see how the Court can possibly say at this time that the provision is going to be under attack on the appeal. The only (39)

point at which that can be determined, I think, is at the expiration of the 60-day period when all appeals will be on file and the Supreme Court will then obviously be the proper forum in which to consider what if any stay should be granted to whom with respect to what provisions, and what if any conditions might be appropriately imposed; and I suppose one of the main considerations in connection with any stay based upon a until final disposition of the Supreme Court, would be when the case was going to be so disposed of, and I submit that only the Supreme Court itself would be in a position to speak on that point or to give consideration to that question. It might very well insist as a condition of a stay on an expedition of the appellate process, or that the case could be more quickly disposed of than it might otherwise be. Of course, the position that the defend-

ants are asking for here is one in which they could sit back and without any appeal of their own simply have complete protection with no incentive whatsoever to cooperate with the Government in getting a speedy determination. That I think would be a very unfortunate place in which to put the case.

Judge Hand: Now, Mr. Wright, regarding the time they ask for on divestiture of these pooling contracts as compared with joint ownership—what have you got to say to that?

(40)

Mr. Wright: With respect to that, your Honor, I see no essential difference between a pooling agreement or a profit-sharing lease or those other agreements which the Court found to be unlawful in themselves, and, let us say, a franchise. I assume that all of these agreements of that character which are found to be unlawful are terminated and become unenforcible on the date that the judgment becomes effective. Now, I see no special reason for any extension of the period at which those agreements become unenforcible. It is true that the declaration of unenforcibility will lead to the making of new arrangements between the present parties. They have already had six or seven months in which to explore the possibilities, and are given additional time in which to complete them; and it seems to me that if any special hardship case should develop and the facts were brought to the attention of the Department, I would assume that there would be no difficulty in granting such particular time as might be necessary to avoid a particular hardship. But I see no reason whatsoever for just a blanket postponement of the effective date of that relief. These agreements are illegal in themselves, and I see no reason why their continuance should be countenanced after the date of the judgment.

(41)

Judge Hand: What about the joint ownership?

Mr. Wright: Well, the joint ownership is appropriately taken care of now by a two-year provision. They are given a two-year—

Judge Hand: They say they would like them coterminous.

Mr. Wright: Well, it seems to me they are essentially different things.

Judge Hand: Well, that is just what I wanted to hear.

Mr. Wright: The reason for the two-year period in dissolving the joint ownerships, I take it, is that these involve transfers of stock and property which by their nature require a more elaborate treatment. Now, these pools which are the product of simply an agreement, it seems to me, are effectively terminated simply upon a voiding of the agreement. That settles the pool. Now, I see no reason why any time is required for the termination of one of that character other than what has already been given. The judgment, as I say, declares franchises invalid as of the date it becomes effective. I see no distinction between such agreements and the pooling agreements in so far as illegality is concerned or the time at which they should be terminated. It seems to me they should all be terminated when the judgment becomes effective.

(42)

Mr. Caskey: If your Honors please, it seems to me that the distinction which Mr. Wright seeks to make between the pools and the joint ownership is utterly unrealistic. Many of these so-called pools involving two or more theatres which are operated by one of these defendants for the joint account of themselves and a third party are in corporate form; many of them are set up by joint ventures; others exist by virtue of leases or subleases or assignments of leases. In many cases, or, at least, in a number of cases, the pool itself has acquired for the joint account a third or a fourth theatre; there is no operator; it is not possible just to say that on March 1st the third party will come and take his theatre.

Judge Hand: Well, you have got some time, and a lot of those pools are very obnoxious things. They ought not to have been had; the parties ought to have known enough not to have them even in the vague state of the law about the Sherman Act.

Mr. Caskey: Whatever that fault may be, the fact is that it is not feasible to get third parties to come in to operate

by March 1st. Many of these pools represent theatres owned by third persons, who may technically come within your definition of an operator but who, in fact, are not operators, (43)

who will have to make arrangements for the operation of their theatres, for the purchase of films and for the detail of conducting business again.

We are not seeking delay just for delay's sake but seeking it in order that the rights of both parties will not be prejudiced by any precipitous action, and I think that an orderly dissolution of these pools over a two-year period will be more beneficial to the non-defendants who are involved. We quite agree with your Honors' statement of the law as to its effect upon third parties, but, nevertheless, the orderly return of their property is of importance to us and to the Court.

Mr. Seymour: May I just comment a moment on Mr. Wright's answer to our argument about this stay of the competitive bidding provisions. He suggested that we ought to have waited until we saw whether there was an appeal, and who appealed, and so on. Well, we could not wait because that decree fixed an effective date, and the only way that this application could be made was under the 10-day rule, and we had to come to your Honors to ask you to postpone that effective date.

Now, it is just idle to suggest that no attack upon this competitive bidding provision is going to be made in the Supreme Court. All the friends of the Court practically that (44)

have been here have indicated that they do not like it and they have now, I think, entered orders on your Honors' denial of their interventions; and Judge Arnold, if I could understand it this morning, had not embraced competitive bidding with enthusiasm nor indicated that he was not going to attack it above.

Now, our real point is that if we put this system into effect, and then if the Supreme Court should modify it or

strike it out or do something else in response to the attack which will certainly be made upon it, the whole industry would be just convulsed, and your Honors know that better than the Supreme Court does, and that is the reason we ask your Honors for relief.

Mr. Arnold: If the Court please, I can clarify that. I am authorized to tell the Court that the ATO is going to appeal, and I appreciate Mr. Wright's suggestion that we learn by experience. Pending appeal. We just prefer not to learn by experience during that period, so our position is quite clear on that. I am sorry I did not mention it in my first discourse.

Judge Hand: What?

Mr. Arnold: That there is going to be an appeal, and on (45)

the stay of competitive bidding.

Judge Hand: And what else?

Mr. Arnold: On our desire to have competitive bidding stayed. I am speaking only to competitive bidding.

Mr. Rosenberg: If the Court please, I am an associate of Mr. Levy's, counsel for M. P. T. O. A.—that is, for the independent members thereof. Mr. Levy's train has been delayed from Missouri, and I have been authorized to say that he and the independent members of M. P. T. O. A. are in favor of the distributors' suggestion that the provisions relating to competitive bidding be stayed until such appeals as may be taken are taken.

Mr. Proskauer: Your Honors, the correction we wish made, as I was saying, is on a conclusion of law, No. 9(d). Perhaps the simplest way to get it before your Honors is to give you the present reading and then give you in contrast the way we ask to have it changed.

It now reads, as you find it on page 11:

"Conspiring with the distributor defendants to discriminate against independent competitors in fixing minimum admission prices, run, clearance and other license terms."

The change we wish made is to make that read as it is printed on page 12, namely:

(46)

"Conspiring with the distributor defendants to receive discriminatory license provisions, as found in Finding 110 above."

Our difficulty with this is that it runs directly counter in its general form to the facts as you found them, and subjects us, we think, to very great hazard in treble damage suits.

Now, let me make that clear. If you read the conclusion as it is printed in the decree, and on page 11, it is a general finding of illegality in conspiring against independent competitors in fixing minimum admission prices, run, clearance, and other license terms.

Now, this is what you said in your opinion which directly negatives that in its present form, and I am reading from page 52 of the opinion:

"The foregoing is not to be construed, however, as indicating that the distributor defendants have discriminated among their licensees with respect to film rentals, clearances, or minimum admission prices."

Then follows a discussion which I omit.

(47)

"In the absence of such facts, we are unable to infer that the distributor defendants have violated the Sherman Act in this particular regard, but any discriminations in other ways noted above in favor of affiliated licensees connected with the independent circuits must be enjoined."

And you found specifically in Finding of Fact 110 what those things that were to be enjoined were. If you will look at Finding 110 as it is printed at the bottom of page 11, you will find that you found it as a fact that various con-

tract provisions have resulted in discrimination against small independent exhibitors, and you listed what those were. There is no finding of fact to justify the present conclusion of law in its general form. That Finding of Fact 110 amply justifies it in the form that we suggested, and, indeed, your opinion, that portion of it which I have read, negatives the validity of the general form in which Conclusion of Law 9(d) now reads. And as I said, your Honors, while at first blush this may sound as if it had a semantic phase, it becomes a matter of intense moment to us in defending those treble damage suits which we contemplate as a probability in the light of the decree which you are here making. We fear that if that 9(d) remains in its present form, a man will come in and offer in evidence a contract between us and a theatre, one of our co-distributors, and say he rests, and that the court found that we were conspiring with the distributor defendants to discriminate against (48).

independent competitors in fixing minimum admission prices, run, clearance and other license terms, when, in fact, all that your Honors found in your finding of fact was certain specific violations which we are not asking you to change. Indeed, when it is all said, we are asking you to conform Conclusion of Law 9(d) with Finding of Fact 110 and with your opinion.

Judge Hand: Do you want to say anything, Mr. Wright?

Mr. Wright: Not unless the Court wants to hear me on this. It seems to me quite obvious that Conclusion of Law 9(d) in its present form is a necessary consequence of the factual findings that were made. The Court found that these distributors jointly maintained by conspiracy a system of uniform admission prices, runs and clearances, which, as a matter of law was itself a discrimination against all those not embraced in that combination; and to make the change that is suggested now it seems to me is utterly inconsistent with the findings of fact.

The Clerk: The Court will now proceed with the next motion, which is that of Columbia Pictures.

Mr. Frohlich: If your Honors please, I have but one suggestion to make on the decree. I have proposed that section 7, the very last paragraph in your decree, shall be amended to read as follows:

(48a) "Paragraphs 7, 8 and 9 of section 2 of this judg-

ment shall not become effective until July 1, 1947, and in the event of an appeal to the Supreme Court by any party from those paragraphs, such paragraphs shall not become effective until 90 days after the entry of final judgment upon the mandate of the Supreme Court."

(49)

Now I am speaking, your Honors, on behalf of a company that owns no theatres, and we feel that with the exhaustive provision and the very precise mechanism for competitive bidding, Columbia, owning no theatres, has been placed at a very terrific competitive disadvantage with regard to the Big Five. We can't take our investment and put it in theatres and at least recoup part of our investment. We have got to go out on the highways and byways and sell to strangers. We are going to take an appeal. We feel we have been placed in a position where we can't compete against these five defendants and we are going to appeal against competitive bidding and against the jurisdiction of this Court to make that sort of a decree on competitive bidding, and we are going to do it in view of that fact, that it would be a hardship to compel us to go into this competitive bidding. And until we get a decision from the Supreme Court—and it is going to take a long time to print these voluminous exhibits—I think the Supreme Court adjourns in May—I don't think we can get this appeal on before the summer and I don't think anybody in the country is going to be hurt or injured if there is a restraining provision in the decree giving us additional time until the Supreme

(50)

Court decision comes down. The exhibitors don't want it. There is not an exhibitor in the United States who wants competitive bidding. The Little Three don't want it. The Big Five say, "Well, it is all right with us; we are not asking for any time." They ought to be very happy. But we are in a different spot. I want a square deal. I want this Court to give me something to protect ourselves and give me a chance to go up to the Supreme Court to test out whether I have got to compete with five gigantic companies in this matter of competitive bidding and selling because I am afraid we are not going to be able to do it and I am not speaking only for Columbia but I am speaking for every small distributor in the United States.

The Clerk: The Court will now hear counsel in the motion of Universal Pictures.

Mr. Cook: My argument will be directed to one point only: the propriety of franchises of reasonable length with small exhibitors which the decree read literally presently prohibits. I say "read literally," because I believe the matter should be litigated before your Honors or some other court and that it would not be construed to mean that because of the fact that there was no issue in this case as to the invalidity of franchises with small exhibitors, as I shall (51) presently attempt to show.

But that would not help us in a business deal. If we want to make a deal, a franchise deal with a small exhibitor, they won't be satisfied with any such construction of the decree.

Now on the theatre-by-theatre aspect of competitive bidding we think it is a good thing as tending to produce a free market. We do not think it will have the effects that ought to be expected, that might perhaps be expected.

We also assume that picture-by-picture bidding must be followed before we can license a picture to a circuit thea-

tre. We do not believe that either or both of these requirements will succeed in restoring competitive conditions without considerable change in the present theatre setup.

In this connection concerning the stay on competitive bidding which we have also asked for, I think it will make considerable difference in our attitude what the Supreme Court does with other aspects of this, on the theatre setup for instance. Under a different theatre setup we might favor competitive bidding.

Now we take the position, however, that where we desire to license our pictures to a small exhibitor, insistence upon (52)

picture-by-picture bidding will go far to defeat the purposes of this proceeding. These purposes are very plainly stated in the section of the Government's complaint dealing with franchises. They are to protect the independent theatre from the dominance in the buying of pictures of the circuit theatre which is defined as a member of a circuit or buying combine of more than five theatres. There is no complaint whatsoever about franchises as an institution. All of the complaint is about franchises with circuit theatre because they are highly discriminatory against small distributors.

Now here is what the complaint says on the subject of long-term franchises and this is all it says:

"Generally distributors enter into license agreements with exhibitors every season, and most license agreements cover only a single season's output of pictures. In their dealings with circuits, however, both affiliated and unaffiliated, the distributors engage in the practice of entering into long-term franchises. These franchises are for periods varying from two years to twenty years, and they cover the exhibition of pictures released by a distributor during their term in the theatres of the circuits with which they are made. The amount of film rentals involved in a single franchise has (53)

sometimes exceeded two million dollars and a single franchise has sometimes covered the terms of exhibition in more than five hundred theatres in widely separated localities."

Your Honors will note that all that refers to franchises with circuit theatres.

"Long term franchises are generally advantageous to the circuits with which they are made. By virtue of the fact that the circuits have large buying power and pay to the distributors large sums of money, these franchises often discriminate against independent theatres whose buying power is small."

That is the whole burden of this whole thing, that they discriminate against independent theatres, that they discriminate against the independent theatres, and maintain this discrimination during the period of the franchises. They establish the runs and protections with respect to all the theatres in the circuit, and "These franchises deny to other theatres during their term, the opportunity to bid for or to license the runs of pictures covered by such a franchise in competition with the circuit theatres. Another effect of these long term franchises is that they restrict the market for films independently produced and released. Many of these franchises do not contain all the terms and conditions pursuant (54)

to which pictures are licensed, but are simply agreements to enter into binding licenses at some future time.

"Franchises generally provide for the exhibition of pictures in all of the theatres operated by the circuit involved, and some of them have even provided that additional theatres acquired by the circuit during the term of the franchise are to be included within its terms."

And then without reading, it goes on to talk about the discriminatory terms of these franchises, the practice known as underage and overage with double features, vaudeville performances, and so on and so forth. The whole complaint is against franchises with circuit theatres. There is no complaint whatsoever about franchises as an institution. The entire complaint is about franchises with circuit theatres because they are highly discriminatory against small exhibitors.

Then why prohibit franchises of reasonable length with small exhibitors—and I may say that practically all our franchises are two and three-year franchises. Less than one per cent are over that.

Why prohibit franchises of reasonable length with small exhibitors when the best interests of such exhibitors requires a precisely opposite course?

Judge Bright: Aren't you rearguing the merits of the (55)

decision instead of whether this decree should be amended? Why should we go back and reargue the merits of the decree on this motion? The findings of fact have stated what we found on this subject. We are not going to go back to the complaint. We are not interested in going back to the complaint now.

Mr. Cook: I am trying to get a construction of the decree which the complaint really intended.

Judge Bright: Why don't you go back—

Judge Hand: I can't imagine the decree intending any such thing as you are saying. We thought these things were bad because they tied up the thing for a very long time and kept it out of the market. It tended to be discriminatory.

Mr. Cook: Against small exhibitors. Franchises made with circuits were discriminatory against small exhibitors, but franchises with small exhibitors are nevertheless under the prohibitive language of this decree prohibited.

The argument I am making thus is a plea for a more effective decree, not a less effective one, with respect to this particular aspect, franchises.

Now if franchises with small exhibitors are prohibited in this decree, as the literal language would indicate that they are, it must have been for one of two reasons. Either they (56)

were considered to be inherently illegal or they were part of the remedy.

Now that is one reason, Judge Bright, why I speak of the issue, because the prohibition of franchises with small exhibitors could not be part of the remedy if the issue in the

proceeding was the legality or illegality of franchises with circuit theatres and not with independent exhibitors. I think it is quite obvious that it is not part of the remedy.

Are they inherently illegal? That is, franchises of reasonable length.

Well, a franchise is nothing more than an exclusive dealing contract. As a matter of fact the way "franchise" is defined in this decree, it not only prohibits what I regard as a franchise but it prohibits any commitment of your pictures because it does not contain the reservation that I am asking for here, it does not contain the clause that a franchise confers exclusive exhibition rights, for a certain time at least. In other words, any commitment of your pictures for any length of time is legal.

Judge Bright: Under the definition it confines it to one season. You said any length of time.

Mr. Cook: I accept your correction, of course.

Judge Hand: Accept the correction? That was the whole (57)

meat of the coconut. What is the use of talk about it as a correction? We don't intend to have these long franchises whether you have been accustomed to make them or haven't been accustomed to make them. We decided that. Is there to be no end to our decision, no termination of this situation so that people can take their appeal if dissatisfied and go on?

Mr. Cook: I am confining myself to one very close point here, your Honors. If I said "any length of time," of course I misspoke myself, but the requirement of picture by picture selling would prohibit us from selling our pictures for any length of time in conjunction with the other provision concerning franchises.

My argument is going to be very brief here.

Judge Goddard: Is your point, Mr. Cook, that you ought to have the right to license pictures for more than one year, or one season?

Mr. Cook: Yes, to small exhibitors.

Judge Goddard: That is your point?

Mr. Cook: To small exhibitors as defined by the Government in the complaint, and that is independent theatres. Independent theatres are defined as theatres which are not members of a circuit of five or more theatres. I can't see for (58)

the life of me how under the Sherman Act an exclusive dealing arrangement which obtains throughout all business and has time and time again been held to be legal, can be prohibited. As appears from a restatement of the law of contracts, that is stated as one of half a dozen legal restraints of trade. Likewise in Williston on Contracts, there are multitudinous cases holding them as legal. I am not talking about circuits. I am not talking about the suppression of exhibition franchises of that kind or our right to make franchises in the future of that kind. I am only talking about franchises with independent exhibitors for a reasonable period of years.

Now what do we have? Universal makes a franchise with a small exhibitor. We make only a relatively small part of the available features. Certainly a franchise with a small exhibitor can't have any appreciable effect in suppressing competition or restraining trade if it is made for a reasonable term of years and without any unduly restrictive features.

Of course franchises can be applied further in restraint of trade or monopoly. As far as your Honor's statement stands here of restraint, franchises with affiliated theatres and circuits undoubtedly aggravate that. There is no question about that. I am talking about an entirely different thing.

(59)

Now take the situation of a small exhibitor who wants to open a theatre and he goes to a bank and wants to borrow money. Is it conceivable that a bank would lend him any money without his being able to obtain a commitment for one or more distributors' pictures? Is it conceivable that he would entertain going into an operation with these power-

ful interests bidding against him picture by picture? What I am saying is this: your Honors have in non-competitive situations very expressly in your decree excluded the necessity of competitive bidding. Now what I am saying is this: that where a distributor wants to license a small exhibitor, commit his pictures to a small exhibitor for a reasonable term of years, that he should be permitted to do so and it can't—

Judge Bright: Where he makes an agreement of that kind in a particular neighborhood he excludes the other exhibitors from getting their pictures, doesn't he?

Mr. Cook: Yes.

Judge Bright: Then he restrains the other exhibitor—

Judge Hand: But this is too long, it is too much.

Mr. Cook: Of course a franchise might be made for too long a period.

Judge Hand: You say you have them for two or three years. Why should you have them any such length of time as that?

(60)

Mr. Cook: Let me explain, your Honor. Under this decree each one of these great theatre chains has an assurance of product from its parent. That is expressly confirmed in this decree. Therefore your chain theatre, your affiliated theatre, immediately has a tremendous advantage over the independent theatre, which cannot have any assurance of product, which must buy picture by picture, every picture it buys. Therefore the franchises of greater importance to the independent exhibitor. I don't mean that I am arguing the case of the independent exhibitor. Of course not. It is of great importance to us because it is very important to us to have show windows for our pictures just as this decree provides for the major defendants to have.

Now what difference does it make in respect to violations of the Sherman Act whether we obtain our show windows through contract or whether we obtain them through the purchase of a theatre or a great chain of theatres. We may

not have the resources to buy a great chain of theatres. We may have the resources to obtain them through contract, and I can't see that as long as that contract is between a small factor of the exhibition side and a relatively small factor on the distribution side, that if it is for a reasonable term of years, not excessive, and if it has no other objection-

(61)

able features why it should not be considered to be legal.

Now it may be that your Honors will want to pass on each individual application with small exhibitors and there might be a lot of them. The Supreme Court has time and time again said, in the Nash case, and in the Appalachian Coal case, in the Chicago Board of Trade case, that whether there is an unreasonable restraint depends upon all the surrounding facts and circumstances, and I am not saying that every franchise would be legal.

Judge Goddard: Mr. Cook, supposing the pictures are licensed for a period of years, several years. What chance has the independent theatre to get these pictures during those years? He is out of them, isn't he?

Mr. Cook: You mean a competing independent theatre?

Judge Goddard: Yes.

Mr. Cook: That is true of all competing theatres. That is true in all businesses. That is true in the oil industry.

Judge Goddard: It ties it up too long.

Mr. Cook: Too long a period ought not to be permitted.

(62)

Judge Goddard: I suppose the difference is we think beyond one season as too long.

Mr. Cook: I just wondered if your Honors considered a franchise with one exhibitor for a reasonable term discriminatory. This is not the case of these highly discriminatory franchises made with circuit theatres.

Judge Goddard: One of the very purposes of the decree is to protect the rights of the independent theatres.

Mr. Cook: Yes, and I say if this provision of the decree is read in that way it greatly injures the independent theatre.

Judge Hand: I don't understand it at all. You say that, but I don't understand it. I don't think it is necessary. If the particular arrangement benefits one independent theatre, which of course it may, it keeps the other out of the market in regard to that matter, and you simply say that that is customary in all trades, and that is inevitable in all dealings. That is true. It is a question of degree. We guard this thing beyond one season. You haven't said a thing to show me, either in the record or outside of the record, that it was necessary for anybody to tie these things up for more than a season.

Mr. Cook: I, of course, agree with your Honor that the
(63)

unreasonableness of any restraint in anything of this kind is a matter of degree, and that you approach a borderline and you go over unto unreasonableness. But whether this is reasonable or unreasonable, you have got to look primarily at the economic power of the persons involved. Mr. Justice Brandeis in some of his decisions has been particularly clear on this subject in the Katz case which I cite in my memorandum. That is the very basis of the decision in the case. The very basis of the decision in the case was that the business unit indulging in it was not in a monopolistic position.

Judge Hand: I think we have got your point anyway.

Mr. Cook: It doesn't interfere in the slightest with the working of the decree. It is only a clarification of it.

The Clerk: The Court will hear counsel in the United Artists motion.

Mr. Raftery: You know when your Honors got through whittling down what we thought was the copyright—

Judge Hand: That copyright burns in your mind.

Mr. Raftery: —and when you expressly overruled the Supreme Court in the Interstate case, why naturally we must appeal because we may have some friends up there.

However, I am going to confine myself to one section,
(64)

Article 2, Section 4, of the decree, and one sentence in it.

• It is the one sentence that you can see the jail doors in front of you. That is where your Honors have added that "Wherever any clearance provision is attacked as not legal under the provisions of this decree the burden shall be upon the distributor to sustain the legality thereof."

• Now in the remaining sentence of that paragraph you took away from the distributors any right to protect or insert in any contract a clearance that the distributor deemed necessary to protect his revenue in the licensing of the particular copyright. In that first sentence you in effect said only such clearance as the exhibitor—which means our licensee but it meant the exhibitor—reasonably needs shall be granted to protect his revenue. In other words, you put into the hands of an exhibitor the right to tell us what clearance we are going to give. I think it amounts to that in the end. You always had to give the exhibitor the clearance that the exhibitor wanted or you didn't sell him.

We submit as a distributor that it is unfair to shift the burden of sustaining the legality of any clearance if it is ever questioned, and we know it is going to be questioned because under Judge Goddard's consent decree the arbitration boards were almost daily in the beginning hearing (65)

clearance complaints. We submit if there is any burden—I mean if it is necessary to put a provision in here fixing the burden of proof, that burden should be on the exhibitor and not on the distributor, because the clearance is not the clearance the distributor believes he should reasonably have, but it is the clearance that the exhibitor claims he needs for his theatre, and it licenses to the exhibitor in his theatre. That is the only point I am going to argue. Of course, my pets of price fixing and admission prices and so forth, we say in our brief we have got to go to another forum. And likewise on franchises and the right to make franchises we feel there has been an arbitrary fixing of one year. It could have been three, five, or none. But we submit all those things are subjects for the appeal. Likewise, I am not going to press

the point in regard to competitive bidding. I haven't any faith in competitive bidding, because I don't believe the exhibitors are going to knock themselves out for our product. We still have to sell them, as I said on the trial. If we have got good pictures they will buy them. If they are bad, they won't want them.

The Clerk: The Court now stands adjourned.

[fol. 3136] UNITED STATES OF AMERICA,
Southern District of New York, ss:

Equity 87-273

UNITED STATES OF AMERICA, Plaintiff,

vs.

PARAMOUNT PICTURES, INC., et al., Defendants

I, William V. Connell, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties. (Printed pp. 1 to 44; stenographers Minutes pp. 1 to 65.)

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 6th day of May in the year of our Lord one thousand nine hundred and forty-seven and of the Independence of the said United States the one hundred and seventy-first.

William V. Connell, Clerk. (Seal.)